86-668

Supreme Court, U.S.
FILED
OCT 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-

In the Supreme Court of the United States

OCTOBER TERM, 1986

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,
Petitioner,

v.

DAVID DELMAN
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 21, 1986

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QUESTION PRESENTED

Section 2 of the United States Arbitration Act ("Arbitration Act"), 9 U.S.C. § 2, mandates enforcement of valid agreements to arbitrate statutory claims, unless Congress has otherwise expressly exempted the claims from arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. ____, 105 S. Ct. 3346, 3355, 87 L. Ed. 2d 444, 456 (1985). Whether judicially implied rights of action under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78111 ("1934 Act"), are exempt from this arbitration mandate is an open question. *See Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). The Court below held that arbitration of such claims cannot be compelled.

The question therefore presented is:

1. Did the court below err in holding that the mandate of the federal Arbitration Act does not apply to rights of action judicially implied under section 10(b) of the 1934 Act?

PARTIES TO THE PROCEEDING

All of the Parties to the proceeding below are listed in the caption.*

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*Pursuant to Rule 28.1 of the Court, petitioner Merrill Lynch, Pierce, Fenner & Smith Inc. states that it is a subsidiary of Merrill Lynch & Co., Inc., a publicly held corporation whose shares are traded on, among others, the New York Stock Exchange. Subsidiaries of Merrill Lynch, Pierce, Fenner & Smith Inc. that are not wholly-owned are: Merrill Lynch & Co., Canada, Ltd.; Merrill Lynch Canada Incorporated/Incorporee; Merrill Lynch Life Agency Inc. (Ohio); Merrill Lynch Life Agency Inc. (Oklahoma); Merrill Lynch Life Agency Ltd. (Mississippi); Merrill Lynch-Nomura Management Company, Inc.; and ML Life Agency Inc. Affiliates of Merrill Lynch, Pierce, Fenner & Smith Inc. that are not wholly-owned by Merrill Lynch & Co., Inc. are ISU Companies, Inc.; Merrill Lynch Bank & Trust Co.; Merrill Lynch International Bank Limited; Mership Nominees Limited; Michigan Mart Properties Corp.; Peaback Properties, Inc.; Iran Financial Services Company S.S.K.; Merrill Lynch Asset Management Limited; Merrill Lynch (Australia) Pty Limited; Merrill Lynch, Pierce, Fenner & Smith (Brokers & Dealers) Limited; Merrill Lynch, Pierce, Fenner & Smith Limited; Royal Securities Corporation (Canada) Limited; Paluel-Marmont Merrill Lynch S.A.; Merrill Lynch Philippines, Inc.; Merrill Lynch, Pierce, Fenner & Smith Belge S.A.; Merrill Lynch, Pierce, Fenner & Smith (Middle East) S.A.L.; Merrill Lynch, Pierce, Fenner & Smith S.A.; Merrill Lynch S.A.L.; Merrill Lynch, Pierce, Fenner & Smith (Taiwan) Ltd.; Property Protection Associates & Co.; Merrill Lynch — Sun Hung Kai (Overseas Securities) Company Limited; Sun Hung Kai-Merrill Lynch Commodities Limited; Merrill Lynch Representacoes Ltda.; Merrill Lynch Realty Commercial Services of Georgia, Inc.; Hammill-Quinlan, Inc.; Merrill Lynch Realty North Bay Inc.; Merrill Lynch Realty/North Los Angeles, Inc.; Merrill Lynch Realty/Boomhower, Inc.; Merrill Lynch Realty/Burnet, Inc.; Merrill Lynch Realty Carll Burr, Inc.; Merrill Lynch Realty/Cousins, Inc.; Merrill Lynch Realty Santa Barbara, Inc.; Merrill Lynch Realty/Jack Matthews, Inc.; Merrill Lynch Realty/Katella, Inc.; Merrill Lynch Realty/MCK, Inc.; Merrill Lynch Realty/Richard Jowdy, Inc.; Merrill Lynch Realty/Robedeaux, Inc.; Merrill Lynch Realty/Tom Fannin Inc.; and ML/Rodgers & Cummings Insurance, Inc.

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No. 86-

In the Supreme Court of the United States

OCTOBER TERM, 1986

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,
Petitioner,

v.

DAVID DELMAN
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch"), respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not reported and is reprinted in the Appendix at 1a.[1]

The amended decision of the district court, dated July 22, 1985, is not reported and is reprinted in the Appendix at 3a.

[1]Citations to material printed in the annexed Appendix appears as "_____ a".

JURISDICTION

The Court of Appeals issued its decision on July 25, 1986. Petitioner invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are:

1. United States Arbitration Act, ch. 392, 61 Stat. 670 (1947) (codified at 9 U.S.C. § 2);

2. Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j(b);

The Appendix to this petition sets forth the pertinent text of the statutory provisions. (15a).

STATEMENT OF THE CASE

A. Factual and Procedural Background

Merrill Lynch is the largest securities broker-dealer in the United States, with business conducted throughout the country.

In or about March, 1982, respondent opened a securities account with Merrill Lynch at its San Jose, California branch office.

In connection with opening his account, respondent entered into a written Customer Agreement with petitioners. (16a). Paragraph 11 of the Customer Agreement provides, in relevant part, that:

> "It is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or

> pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., as the undersigned may elect."

On or about April 27, 1982, respondent determined to engage in options trading. In connection therewith, respondent then executed an Option Agreement (24a), which provides at paragraph 9, that:

> "Any controversy between us arising out of such option transactions or this agreement shall be settled by arbitration only before the National Association of Securities Dealers, Incorporated, or the New York Stock Exchange, or an Exchange located in the United States upon which listed options transactions are executed."

In July 1984, respondent brought this action against petitioner. The first claim for relief, entitled a claim for "securities fraud," is alleged to arise pursuant to section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b). Respondent's remaining claims for relief are pendent state claims.

B. The Decisions Below

In response to the Complaint, petitioner filed an Answer asserting as an affirmative defense that binding agreements to arbitrate controversies had been entered into by the parties. At the time the Answer was filed, however, the Ninth Circuit's decision in *Byrd v. Dean Witter Reynolds, Inc.*, 726 F.2d 552 (9th Cir. 1984), *rev'd, Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985), precluded arbitration of the pendent state claims for relief, as those claims are factually intertwined with the 1933 Act and 1934 Act claims.

On March 4, 1985, the *Byrd* decision was reversed by this Court, and on April 11, 1985, appellant made its

demand for arbitration on respondent. The demand for arbitration was rejected by respondent and, accordingly, petitioner filed a Petition to Compel Arbitration of the disputes and a Motion for Stay of Proceedings, pursuant to the Arbitration Act.

The district court granted the Petition to Compel Arbitration with respect to the pendent state claims alleged by respondent. However, the district court refused to compel arbitration of respondent's 1934 Act claim or to stay proceedings before it as to that claim.

On appeal, the Ninth Circuit affirmed the district court, holding that the implied claim arising under section 10(b) of the 1934 Act is exempt from the mandate of the Arbitration Act, relying on its recent opinion in *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3159 (U.S. Aug. 29, 1986) (No. 86-321).

REASONS FOR GRANTING THE WRIT

This Court has admonished repeatedly that the Arbitration Act reflects, "a national policy" mandating enforcement of valid arbitration agreements — a mandate that may not be avoided unless Congress itself has explicitly exempted a particular statutory claim from arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. ____, 105 S. Ct. 3346, 3355, 87 L. Ed. 2d 444, 456 (1985). In *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. at 216 n.1, 105 S. Ct. at 1240 n.1, 84 L. Ed. 2d at 162 n.1, the Court expressly left unanswered whether the congressional bar it found to arbitration of claims asserted under the 1933 Act, *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182,

98 L. Ed. 168 (1953), applies equally to judicially implied rights of action asserted under the 1934 Act.[2]

This case squarely raises the arbitrability of an implied 1934 Act claim, an issue which, we respectfully submit, warrants determination by this Court.

I

THE ARBITRABILITY OF AN IMPLIED CLAIM UNDER THE 1934 ACT IS AN ISSUE OF NATIONAL SIGNIFICANCE

The issue presented by this case is significant, not only for Merrill Lynch, but for the entire securities industry and for thousands of brokerage customers as well. The issue is equally significant to the administration of justice in the federal courts. Hundreds, if not thousands, of civil actions are filed annually under the 1934 Act.[3] Cumulatively, these cases — including many meritless claims —

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[2]In *Byrd,* reiterating reservations expressed earlier in *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974); *reh'g denied,* 419 U.S. 885, 95 S. Ct. 157, 42 L. Ed. 2d 129 (1974), the Court questioned those lower federal court decisions that had simply transferred the bar to arbitration of 1933 Act claims to allegations made under the 1934 Act. Justice White, concurring, observed that the issue of the arbitrability of 1934 Act claims "remains open and the contrary holdings of the lower courts must be viewed with some doubt." 470 U.S. at 225, 105 S. Ct. at 1244, 84 L. Ed. 2d at 168 (White, J., concurring).

[3]Statistics filed by the Administrative Office of the United States Courts indicate that over 3,064 private civil actions under federal "Securities, Commodities and Exchanges" statutes were filed in the district courts between April 1, 1985 and March 31, 1986. *See* Administrative Office of the United States Courts, *Federal Judicial Workload Statistics for the Twelve Month Period Ended March 31, 1986,* Table C-2 at 13.

impose an enormous cost upon the already overburdened courts as well as upon the securities industry.

This is so even though the claimants in most of these cases have contractually committed to arbitrate any disputes with their securities brokers. As a result of the decision below and decisions in other circuits that have ruled similarly,[4] however, the strong congressional policy favoring enforcement of such agreements has been nullified, and the public cost Congress sought to avoid through the Arbitration Act has become instead an increasing public burden.

Moreover, the arbitrability of 1934 Act claims has been litigated in well over 100 cases decided since *Byrd*. *See* 30 a. Thus, the issue here involved is widely litigated, of industry-wide significance, and with national application. Without action by the Court now, the surge of litigation involving this issue is certain to continue, and inconsistent results of the sort that have already appeared are bound to proliferate, to the detriment of litigants and the courts alike.

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[4]*See Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3d Cir. 1986), *petition for cert. filed*, No. 86-487 (Sept. 25, 1986); *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 14, 1986) (No. 86-44); *Intre Sport v. Kidder*, 795 F.2d 1004 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3023 (U.S. July 16, 1986) (No. 86-40); *Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850 (11th Cir. 1986); *King v. Drexel Burnham Lambert, Inc.*, 796 F.2d 59 (5th Cir. 1986).

II

A DIRECT CONFLICT EXISTS BETWEEN THE CIRCUITS AS TO THE ARBITRABILITY OF JUDICIALLY IMPLIED 1934 ACT CLAIMS

Merrill Lynch and the entire securities industry face diametrically opposed decisions in different circuits as to the arbitrability of judicially implied 1934 Act claims.

The Second, Third, Fifth and Eleventh Circuits, relying to a great extent on the precedent of prior decisions within those circuits, have refused enforcement of agreements to arbitrate claims arising under section 10(b). *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3d Cir. 1986); *Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850 (11th Cir. 1986); *King v. Drexel Burnham Lambert, Inc.*, 796 F.2d 59 (5th Cir. 1986). In the instant case, the Ninth Circuit denied enforcement of an agreement to arbitrate claims arising under section 10(b), relying on its decision in *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520.

Conversely, the Eighth Circuit has held that the same Merrill Lynch customer agreement which exists in this case includes an agreement to arbitrate claims implied under the 1934 Act. *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986).

The conflict among the circuits is thus advertent and direct, and has a substantial impact on petitioner. Only a ruling by this Court will resolve it.

III

THE COURT OF APPEALS DECISION CONCERNING THE ARBITRABILITY OF AN IMPLIED RIGHT OF ACTION UNDER THE 1934 ACT IS IN CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT.

The decision reached by the Ninth Circuit in *Conover*, 794 F.2d 520, and in this case, as well as the previous decisions of the Second, Third, Fifth and Eleventh Circuits on the instant issue, conflict with this Court's recent decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. ____, 105 S. Ct. 3346, 87 L. Ed. 2d 444. Although this Court did not directly address the instant issue in *Mitsubishi*, in holding that the Arbitration Act mandates arbitration of claims arising under the Sherman Act in the context of an international commercial transaction, the Court set forth the test for determining whether a federal statutory claim is arbitrable and rejected the same justifications for denying arbitration advanced by the Ninth Circuit in *Conover* and in the instant case.

In *Mitsubishi*, this Court expressly held that exceptions to arbitration of statutory claims are to be found *only* in congressional pronouncements:

> "Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. . . . We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a

> judicial forum, that intention will be deducible from text or legislative history. . . . *Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.*

Id. at ____, 105 S. Ct. at 3355, 87 L. Ed. 2d at 456 (emphasis added). (Citations omitted)

Thus, the question in this case is whether congressional policy articulated in the 1934 Act prohibits arbitration of a judicially implied claim arising under section 10(b) of the 1934 Act, despite the strong congressional policy favoring arbitration.

The starting point of the analysis is this Court's decision in *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953). *Wilko* involved a claim under section 12(2) of the 1933 Act, 15 U.S.C. § 77l(2), and the perceived conflict between that section and section 2 of the Arbitration Act. Section 12(2) expressly provides a right of action to an individual purchasing a security sold in violation of other provisions of the 1933 Act. The plaintiff in *Wilko* had signed an agreement containing a predispute arbitration clause. Wilko argued that to order arbitration pursuant to the Arbitration Act would contradict section 14 of the 1933 Act, 15 U.S.C. § 77n, which voids "[a]ny condition, stipulation, or provision binding any person . . . to waive compliance with any provision . . ." of the 1933 Act.

In deciding not to enforce the arbitration clause, despite the language of section 2 of the Arbitration Act, this Court noted that Congress created in section 12(2) of the 1933 Act a "special right . . . which differs substantially from the common-law action in that the seller is made to assume the burden of proving lack of scienter," which is

"enforceable in any court of competent jurisdiction — federal or state — and removal from a state court is prohibited." *Id.* at 431, 74 S. Ct. at 184-85, 98 L. Ed. at 173 (footnote omitted). The Court held that the arbitration provision was a "stipulation" requiring the plaintiff to waive compliance with these express provisions of section 12(2) of the 1933 Act, and was, therefore, void. *Id.* at 434-35, 74 S. Ct. at 186, 98 L. Ed. at 175. Thus, the Court in *Wilko* essentially applied the *Mitsubishi* test by finding express statutory provisions enacted by Congress in the 1933 Act which indicated Congress' intent to preclude 1933 Act claims from arbitration.

In contrast, no statutory conflict is present in the instant case. As this Court noted in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513, 94 S. Ct. 2449, 2454, 41 L. Ed. 2d 270, 278 (1974), "[t]here is no statutory counterpart of § 12(2) in the Securities Exchange Act of 1934, and neither § 10(b) of that Act nor rule 10b-5 speaks of a private remedy to redress violations of the kind alleged here." Likewise, the special nature of the right to recover for misrepresentations under section 12(2), where the seller is made to assume the burden of proving lack of scienter, is not present in the judicially implied remedy under section 10(b) of the 1934 Act, which is "not so different from the common law action." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. at 225, 105 S. Ct. at 1244, 84 L. Ed. 2d at 168 (White, J., concurring).

In the absence of a direct statutory conflict between the 1934 Act and the Arbitration Act, the analysis engaged in by the Ninth Circuit, which essentially weighs the policies underlying the 1934 Act against those underlying the Arbitration Act, was both erroneous and unnecessary. For it is Congress, rather than the courts, which must balance the competing policies involved. The language of

the Arbitration Act, which this Court has held "[b]y its terms . . . mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed" must prevail. *See Byrd* at 218, 105 S. Ct. at 1241, 84 L. Ed. 2d at 163.

Moreover, the policy analysis used by the Ninth Circuit in *Conover*, 794 F.2d 520, and applied in this case, fails. In denying arbitration of section 10(b) claims, the Ninth Circuit concluded in *Conover* at 524, that "[t]he policies served by judicial enforcement of section 10(b) and Rule 10b-5 reflect the unsuitability of arbitration for such claims," and as examples of the policy cited (1) the deterrent effect of redressing violations in federal court, (2) the alleged overbearing of securities dealers vis-a-vis securities customers and (3) the purported need for judicial direction to ensure the effectiveness of the protective provisions of the 1934 Act. Each of these justifications for denying arbitration was asserted in *Mitsubishi*, 473 U.S. ____, 105 S. Ct. 3346, 87 L. Ed. 2d 444, and each was rejected.

Regarding the alleged deterrent effect of actions by private litigants in federal court, in *Mitsubishi* this Court stated that "[n]otwithstanding its important incidental policing function, the treble-damages cause of action" under the antitrust laws "seeks primarily to enable an injured competitor to gain compensation for that injury." *Id.* at ____, 105 S. Ct. at 3359, 87 L. Ed. 2d at 460. That conclusion is even more compelling under the 1934 Act where compensation is limited to actual damages. 15 U.S.C. § 78bb.

The allegation that securities customers are subject to overbearing by securities dealers was also considered by the *Mitsubishi* Court in the antitrust context and rejected as an "undemonstrated assumption that the arbitration clause is tainted." The Court noted that a party resisting

arbitration may directly attack the validity of the arbitration agreement if the party believes that the agreement was fraudulently procured. *Id.* at ____, 105 S. Ct. at 3357, 87 L. Ed. 2d at 459.

The focus by the Ninth Circuit on the bargaining position of parties to arbitration agreements reflects more than merely a concern for freely negotiated agreements. It also appears to reflect two underlying presumptions: (1) that the arbitration process is biased or unfair, and (2) that the statutory rights at issue cannot or will not be properly vindicated in arbitration. Both presumptions were rejected in *Mitsubishi*. With respect to the former, this Court reasoned:

> "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators."

Id. at ____, 105 S. Ct. at 3358, 87 L. Ed. 2d at 460. With respect to the latter, the Court concluded:

> "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

Id. at ____, 105 S. Ct. at 3355, 87 L. Ed. 2d at 456.

A third factor noted by the Ninth Circuit as demonstrative of the unsuitability of section 10(b) claims for arbitration was the purported need for judicial direction to ensure the effectiveness of the protective provisions of the 1934 Act. The Court also addressed this contention in *Mitsubishi* by observing that "so long as the prospective litigant effectively may vindicate its statutory cause of

action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at ____, 105 S. Ct. at 3359-60, 87 L. Ed. 2d at 461-62. The likelihood of such vindication in the section 10(b) context is enhanced by the fact that section 10(b) claims are "not so different from the common law action." *Byrd,* 470 U.S. at 225, 105 S.Ct. at 1245, 84 L.Ed 2d at 168 (White, T., concurring) Claims for common law fraud are regularly sent to arbitration and resolved by arbitrators. *See, e.g., Southland Corp. v. Keating,* 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

In sum, the policy justifications against arbitration which were articulated by the Ninth Circuit in *Conover,* 794 F.2d 320, were rejected by this Court in *Mitsubishi,* 473 U.S. ____, 105 S. Ct. 3346, 87 L. Ed. 2d 444. Moreover, the policy analysis in which the Ninth Circuit engaged was unnecessary and inappropriate, as there is no statutory conflict between the 1934 Act and the Arbitration Act. As Justice White noted in his concurring opinion in this Court's decision in *Byrd,* 470 U.S. at 224, 105 S. Ct. at 1244, 84 L. Ed. 2d at 167, "*Wilko's* reasoning cannot be mechanically transplanted to the 1934 Act." The factors and concerns which led this Court in *Wilko* to deny enforcement of the arbitration agreement as to section 12(2) claims simply are not present with respect to section 10(b) claims. Therefore, this Court should resolve the conflict among the circuits by holding that the Arbitration Act mandates arbitration of judicially implied claim under section 10(b) of the 1934 Act, when that claim is otherwise referable to arbitration under an agreement between the parties.

CONCLUSION

A review of the issue in the instant case by this Court will resolve an important question of federal law concerning the rights of contracting parties to arbitration, settle a difference between a decision of the Court of Appeals and an applicable decision of this Court, reconcile a conflict among the circuits, and provide direction which will have a substantial impact on federal court caseloads. For these reasons, petitioner respectfully requests that its Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

October 21, 1986

Respectfully submitted,

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APPENDIX

No. 85-6103

D.C. # CV-84-3869-MRP

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID DELMAN,
Plaintiff-Appellee,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware Corporation,
Defendant-Appellant.

MEMORANDUM*

NOT FOR PUBLICATION

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding
Argued and submitted May 8, 1986
Filed July 25, 1986

Before: BROWNING, SCHROEDER, and BOOCHEVER, Circuit Judges.

Appellant Merrill Lynch, Pierce, Fenner & Smith, Inc. appeals the district court order denying its petition to compel arbitration of plaintiff-appellee David Delman's claim under the Securities and Exchange Act of 1934. Our recent decision in *Conover v. Dean Witter Reynolds, Inc.*, No. 85-6082, controls this case, and therefore, we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

In 1982, Delman opened a cash management account with Merrill Lynch and signed a written customer agreement which contained an arbitration provision. In July 1984, Delman brought this action in district court, claiming that Merrill Lynch violated section 10(b) of the Securities Exchange Act of 1934, and alleging state law claims. On April 11, 1985, after the Supreme Court decided *Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct. 1238 (1985), Merrill Lynch filed its petition for an order compelling arbitration of both the federal and state law claims. The district court granted Merrill Lynch's motion to compel arbitration of the state law claims, but denied the motion as to the federal securities claim. Merrill Lynch then brought this appeal.

In *Conover v. Dean Witter Reynolds, Inc.*, we concluded that agreements to arbitrate controversies arising under section 10(b) of the 1934 act are unenforceable. Therefore, the district court properly refused to compel arbitration of Delman's claim arising under section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder.

Affirmed.

Case No. CV 84-3869 MRP

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID DELMAN,

Plaintiff,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC., a Delaware corporation,

Defendant.

AMENDED MEMORANDUM AND ORDER

Filed: July 22, 1985.

Defendant's petition for an order compelling arbitration and staying proceedings, and plaintiff's motion for partial summary judgment were heard together on June 10, 1985 before the Honorable Mariana R. Pfaelzer. The Court issued a Memorandum and Order with respect thereto which was entered June 27, 1985. On July 10, 1985, defendant's motion to amend this Court's order of June 27, 1985 to include certification pursuant to 28 U.S.C. § 1292(b) was heard before the Honorable Mariana R. Pfaelzer. After considering the arguments made and the papers filed, the Court issues the following Memorandum and Orders:

DISCUSSION

A. Background

Plaintiff, David Delman ("Delman"), brought this action against Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") alleging violations of federal securities laws, § 10(b) and § 13(c) of the Securities Act of 1934 ("1934 Act"), fraud, breach of fiduciary duty, and negligence. In March 1980, Delman was involved in a serious

automobile accident in which he sustained head and brain injuries. Delman received $1.3 million in settlement of the accident after attorneys' fees were paid. On the recommendation of his attorney, Delman sought investment advice with respect to the settlement from Merrill Lynch account executive Patrick Tuohy ("Tuohy") at Merrill Lynch's San Jose office. Delman states that he explained to Tuohy the source of his funds and his need for conservative investments to preserve the capital and provide him with a safe and reliable source of income.

In approximately March 1982, Delman entered into a written Customer Agreement with Merrill Lynch and opened a Cash Management Account ("CMA"). The CMA Customer Agreement contains an arbitration clause. It is undisputed that, at the time Delman signed the Customer Agreement, Tuohy did not discuss the arbitration clause with Delman.

In March or April 1982, Delman alleges that Tuohy called him and recommended that he purchase a security option. According to Delman, neither Tuohy nor anyone else at Merrill Lynch informed him of the risks of option trading. Delman alleges that Merrill Lynch assured him that option trading was "sure profit," and consistent with a conservative investment strategy. After Delman agreed to purchase options, Tuohy sent an Option Trading Agreement to Delman at his home. Delman executed the agreement and sent it back to Merrill Lynch. The Option Trading Agreement contains an arbitration clause almost identical to the clause contained in the Customer Agreement which Delman had earlier signed. Merrill Lynch does not dispute the fact that Tuohy never discussed the arbitration clause in the Option Trading Agreement with Delman.

In July 1984, Delman brought this action. On April 11, 1985, after the Supreme Court handed down its decision

in *Dean Witter Reynolds, Inc. v. Byrd,* 53 U.S.L.W. 4222 (March 4, 1985), Merrill Lynch filed its petition for an order compelling arbitration of both the state and federal claims and staying these proceedings. On May 1, 1985, Delman moved for partial summary judgment arguing, among other things, that the arbitration clauses in both the CMA Customer Agreement and the Option Trading Agreement were adhesion contracts and were unenforceable under California law.

B. Arbitration

Both the CMA Customer Agreement and the Option Trading Agreement signed by Delman contain arbitration clauses. Paragraph 11 of the Customer Agreement states:

> It is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc., or pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc.

Paragraph 9 of the Option Trading Agreement states:

> Any controversy between us arising out of such option transactions or this agreement shall be settled by arbitration only before the National Association of Securities Dealers, Incorporated, or the New York Stock Exchange, or an Exchange located in the United States upon which listed options transactions are executed.

Until very recently, Ninth Circuit precedent would have precluded the arbitration of Delman's claims because, in the same action, both federal securities claims and pendent state claims are alleged. *Byrd v. Dean Witter Reynolds, Inc.*, 726 F.2d 522 (9th Cir. 1984). However, the

Supreme Court reversed the Ninth Circuit's decision in *Byrd*, holding that where there is an arbitration agreement within the scope of the Federal Arbitration Act, 9 U.S.C. §§ 2-4, and both state and federal securities claims are alleged, the state claims must be arbitrated despite the fact that federal securities claims are to be adjudicated in the court proceedings. *Byrd*, 53 U.S.L.W. at 4223.

Section 2 of the Arbitration Act provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.§ 2. Section 2 is a "declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). However, not all arbitration agreements will be enforced under § 2. There are two limitations on enforceability: (1) the agreement to arbitrate must be part of a written maritime contract or a contract "evidencing a transaction involving commerce," and (2) the arbitration agreement is subject to any contract defenses. Thus, "the underlying issue of arbitrability . . . [is] a question of substantive federal law," but "a party may assert general contract defenses . . . to avoid enforcement of an arbitration agreement." *Southland Corp. v. Keating*, 52 U.S.L.W. 4134, 4135 n.10 (Jan 23, 1984). Both the scope of the Arbitration Act and the enforceability of these particular arbitration agreements are at issue in this case.

Delman and Merrill Lynch agree that both the Customer Agreement and the Option Trading Agreement involve commerce, and both are obviously in writing. Delman, however, argues that federal securities claims are outside the scope of the Arbitration Act, and thus that his claims under §§ 10(b) and 13(c) of the Securities Act of 1934 cannot be arbitrated. Delman also argues that the arbitration clauses are unenforceable as a matter of California law.

1. Federal Securities Claims

In *Wilko v. Swann*, 396 U.S. 427 (1953), the Supreme Court held that a predispute agreement to arbitrate claims that arise under § 12(2) of the Securities Act of 1933 was not enforceable. The Ninth Circuit has extended the *Wilko* analysis to the 1934 Act. Thus, predispute agreements to arbitrate any federal securities claims are unenforceable. *DeLancie v. Birr, Wilson & Co.*, 648 F.2d 1255 (9th Cir. 1981).

In *Byrd*, the Supreme Court refused to reconsider *Wilko* or to decide the applicability of the *Wilko* rationale to § 10(b) claims. *Byrd,* 53 U.S.L.W. at 4222, n. l. In his concurring opinion, however, Justice White argued that the applicability of *Wilko* to the 1934 Act "was a matter of substantial doubt." *Id.* at 4225. On the basis of Justice White's concurrence, Merrill Lynch argues that "this Court is free to examine the Ninth Circuit's extension of *Wilko* to 1934 Act claims," and urges the Court to send Delman's federal claims to arbitration. The Court declines this invitation because, despite Justice White's concurrence, the law in the Ninth Circuit is that all federal securities claims must be decided by the court and not by an arbitrator. Thus, the Court will not enforce the arbitration agreements which respect to the federal claims.

2. The Enforceability of the Arbitration Clauses

Merrill Lynch does not dispute the fact that some arbitration clauses may be unenforceable, but it argues that federal, rather than state law determines enforceability. Conversely, Delman argues that federal law determines the scope of arbitration, but that state law determines the enforceability of a particular agreement. The Court finds that Delman's analysis more closely approaches its own.

Section 2 states explicitly that arbitration agreements will be enforced "save upon such grounds as exist at law or in equity for the revocation of *any contract.*" (Emphasis added.) Thus, at a minimum, and despite any developing federal common law of arbitration agreements, state law contract defenses could apply to an arbitration agreement. In *Southland,* 52 U.S.L.W. at 4136, the Court noted that "a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement." Fraud is indisputably a state law contract defense. Thus, if as a matter of state law, the agreement to arbitrate would not be enforced, this court should not order arbitration.

a. The Merrill Lynch Arbitration Agreements

In *Parr v. Superior Court,* 188 Cal. Rptr. 801 (1983), a California appellate court held that a clause in a Merrill Lynch Customer Agreement identical to the clause at issue in this case, was an adhesion contract. A contract of adhesion is "a standardized contract, which imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject." *Graham v. Scissor-Tail, Inc.,* 171 Cal. Rptr. 604, 610, 28 Cal. 3d 807, 817 (1984). The Customer Agreement and the Option Trading Agreement fit this definition. *See Parr,* 188 Cal. Rptr. at 801;

Hope v. Superior Court, 175 Cal. Rptr. 851 (App. 1981); *Richards v. Merrill Lynch, Pierce, Fenner & Smith,* 135 Cal. Rptr. 26 (App. 1976).

The fact that the arbitration clauses are adhesion contracts, however, does not make them unenforceable. Indeed, in *Parr,* the court enforced the Merrill Lynch Customer Agreement against an investor. There are two limitations on the enforcement of an adhesion contract or provisions thereof. An adhesion contract will not be enforced against the weaker or "adhering" party, if the contract does "not fall within that party's reasonable expectations," or even if consistent with the parties' expectations, the contract, in its context, is unduly oppressive or unconscionable. *Scissor-Tail,* 171 Cal. Rptr. at 612.

i. Unconscionability

A "dispute settlement arrangement" is unenforceable if it fails to meet "minimum levels of integrity." *Scissor-Tail,* 171 Cal. Rptr. at 615. Relying on *Hope,* 175 Cal. Rptr. at 851, and *Richards,* 135 Cal. Rptr. at 26, Delman argues that the arbitration agreements are unenforceable because they require arbitration before a New York Stock Exchange ("NYSE") arbitrator.[1] Merrill Lynch is a member of the NYSE and has a seat on the Board of Governors. In *Hope,* the court held that there was "a presumptive *institutional* bias in favor of (NYSE) member firms and members who constitute the electoral constituency of the (NYSE) board." *Hope,* 175 Cal. Rptr. at 856. In *Richards,* the court concluded that the potential

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[1]The parties agree that the rules governing arbitrations with the NYSE, the National Association of Securities Dealers, Inc., or any other Exchange upon which listed options are traded are substantially identical. For purposes of brevity, the Court will refer to the NYSE rules throughout this Order.

for abuse by Merrill Lynch under an NYSE arbitration was too great to enforce the provision against a customer. The court based its decision on, among other things, the fact that all of the arbitrators are appointed by either the Board of Governors of the NYSE or the Chair of the Exchange, that controversies are arbitrated at the time and place designated by the arbitrator, that the exchange may alter, amend, or repeal any of the rules and procedures applicable to arbitration, and that the arbitrators are given wide discretion to determine the procedures for each arbitration. *Richards*, 135 Cal.Rptr. at 28-29.

In *Parr,* however, the court reviewed both the *Hope* and the *Richards* decisions and read them in light of the recently amended NYSE arbitration rules. The court found that the NYSE rules met "minimum levels of integrity." The court took judicial notice of the fact that the Securities and Exchange Commission ("SEC") approved the new arbitration rules and that the SEC is charged with protecting the public in the area of securities. *Parr*, 188 Cal. Rptr. at 805. The *Parr* decision, in addition to being the most recent California court pronouncement on the Merrill Lynch arbitration clause and the NYSE arbitration proceedings, is well reasoned and persuasive. An NYSE arbitration would not deny Delman his "common law right of fair procedure." *Scissor-Tail*, 171 Cal. Rptr. at 615. Of course, if Delman is ultimately dissatisfied with the NYSE arbitration, he can petition the Court to vacate the arbitration award. *See* Cal. Code Civ. Proc. §§ 1285.8, 1286.2; *Parr*, 188 Cal. Rptr. at 806.

ii. Delman's Reasonable Expectations

The question of whether the adhering party reasonably expected that he or she would be required to arbitrate his or her claims, is a fact-based inquiry for which there is no clear standard. *See Parr*, 188 Cal. Rptr. at 804. In the

context of a malpractice action against a hospital, where a patient was being admitted pursuant to his doctor's orders and signed a hospital admission form which contained an arbitration clause, the court held that absent "plain and clear notification" of the terms and an "understanding consent thereto," the clause would not be enforced. *Wheeler v. St. Joseph Hospital*, 133 Cal. Rptr. 775, 784 (1977). In *Parr*, in the context of a broker-client relationship, the court noted that in *Keating v. Superior Court*, 183 Cal. Rptr. 360 (1981), the California Supreme Court stated that a "provision for arbitration in a commercial context is quite common, and reasonably to be anticipated." Although the *Parr* court did not articulate a precise standard, the Court reads the *Parr* opinion to apply a reasonable investor standard. In effect, what the court asked was whether a reasonable investor would have read the arbitration clause and understood what it meant. The court found that the fact that the plaintiff in *Parr* claimed that he had never read the clause was irrelevant. The issues were simply: could he read the contract, was he given a chance to read it, and would he have understood it had he read it.

In this case, although Delman does stress his mental impairments, there is no allegation that he cannot read or comprehend written words. Delman only claims that he has trouble remembering what he reads. Delman does not state that he never read the contracts or the arbitration clauses, he simply asserts that Merrill Lynch had an affirmative obligation to discuss the arbitration clause with him, or at a minimum, to incorporate the NYSE arbitration rules into the Customer Agreement and Option Trading Agreement.

Neither contract is very long. The Customer Agreement consists of approximately 15 paragraphs and is printed in large and easy to read type. The arbitration clause is

paragraph 11, which is on the front page of the two-page agreement. The Option Trading Agreement is even shorter. It consists of 12 paragraphs and covers one-half of a legal page. The type is smaller on the Option Trading Agreement than it is on the Customer Agreement, but it is still quite legible.

In short, the Court finds that Delman had notice of the clauses in both contracts and that the clauses were within his reasonable expectations. With respect to Delman's state claims, the arbitration agreements should be enforced.

C. Procedural Posture of This Case

The Court does not believe that the interests of justice would best be served by a stay of the federal claims in this Court. Thus, the Court will allow discovery to proceed with respect to the federal claims, and the Court will conduct a settlement conference with the parties. The Court sets the pre-trial conference date for September 16, 1985, and sets trial for October 22, 1985. Delman's pending motion for partial summary judgment shall be renoticed in accordance with the Local Rules.

D. Certification under 28 U.S.C. § 1292(b).

The Court recognizes that the portion of this order refusing to refer plaintiff's claim under the 1934 Act to arbitration involves a controlling question of law, on which there is a substantial ground for difference of opinion respecting its correctness. An immediate appeal from this order will materially advance the ultimate termination of this litigation. Accordingly, this Court will certify that portion of this order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

THEREFORE, IT IS ORDERED that:

1. Defendant's motion for an order compelling arbitration of the state law claims is granted;

2. Defendant's motion for an order compelling arbitration of the federal securities law claims is denied;

3. Defendant's motion for an order staying the federal court proceedings is denied;

4. Plaintiff's motion for partial summary judgment with respect to the federal securities claims is placed off calendar. Plaintiff's counsel shall re-notice that motion in accordance with the Local Rules;

5. Discovery with respect to the federal securities law claims shall proceed;

6. The settlement conference which was scheduled for June 24, 1985 shall be rescheduled. Counsel are to set a settlement conference with the court clerk;

7. The pre-trial conference will be conducted on September 16, 1985, at 1:30 P.M. and trial will commence October 22, 1985, at 10:00 A.M.;

8. The portion of this Order refusing to refer plaintiff's claim under the 1934 Act to arbitration is certified to the Ninth Court of Appeals pursuant to 28 U.S.C. 1292(b) because the issue involves a controlling question of law, on which there is a substantial ground for difference of opinion respecting its correctness, and an immediate appeal from the Order will materially advance the ultimate termination of this litigation.

9. Counsel shall advise the Court forthwith as to whether or not the Ninth Circuit accepts the interlocutory appeal.

DATED: July 22, 1985

MARIANA R. PFAELZER

MARIANA R. PFAELZER
United States District Judge

Presented By:

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
WILLIAM K. SWANK
MAREN E. NELSON

By MAREN E. NELSON

MAREN E. NELSON
Attorneys for Defendant
MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.

STATUTORY PROVISIONS

United States Arbitration Act, ch. 392, 61 Stat. 670 (1947) (codified at 9 U.S.C. § 2):

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j(b):

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

MERRILL LYNCH PIERCE FENNER & SMITH INC.
CUSTOMER AGREEMENT

In consideration of your accepting and carrying one or more accounts for the undersigned, the undersigned hereby agrees that:

1. APPLICABLE RULES AND REGULATIONS

All transactions shall be subject to the constitution, rules, regulations, customs, and usages of the exchange or market and its clearing house, if any, upon which such transactions are executed.

2. DEFINITION

For purposes of this agreement, "securities and other property" shall include, but shall not be limited to, money, securities and commodities of every kind and nature and all contracts and options relating thereto, whether for present or future delivery.

3. SECURITY INTEREST

All securities and other property now or hereafter held, carried or maintained by you in or for any of the accounts of the undersigned, now or hereafter opened, including any accounts in which the undersigned may have an interest, shall be subject to a lien for the discharge of all the indebtedness and other obligations of the undersigned to you, and are to be held by you as security for the payment of any liability or indebtedness of the undersigned to you in any of said accounts. You shall have the right to transfer securities and other property so held by you from or to any other of the accounts of the undersigned whenever in your judgment you consider such a transfer necessary for your protection. In enforcing your lien, you shall have the discretion to determine which

securities and property are to be sold and which contracts are to be closed.

4. LIQUIDATION

You shall have the right to require additional collateral in accordance with your general policies regarding your margin maintenance requirements, as such may be modified, amended or supplemented from time to time, or if in your discretion you consider it necessary for your protection at an earlier or later point in time than called for by said general policies, or in the event that a petition in bankruptcy or for appointment or a receiver is filed by or against the undersigned, or an attachment is levied against the accounts of the undersigned, or in the event of the death of the undersigned, to sell any or all securities and other property in the accounts of the undersigned with you, whether carried individually or jointly with others, to buy any or all securities and other property which may be short in such accounts, to cancel any open orders and to close any or all outstanding contracts, all without demand for margin or additional margin, notice of sale or purchase, or other notice or advertisement. Any such sales or purchases may be made at your discretion on any exchange or other market where such business is usually transacted, or at public auction or private sale; and you may be the purchaser for your own account. It is understood that any prior demand or call or prior notice of the time and place of such sale or purchase shall not be considered a waiver of your right to sell or buy without any such demand, call or notice as herein provided.

5. PAYMENT OF INDEBTEDNESS UPON DEMAND

The undersigned shall at all times be liable for the payment upon demand of any debit balance or other obligations owing in any of the accounts of the undersigned with you and the undersigned shall be liable to you

for any deficiency remaining in any such accounts in the event of the liquidation thereof, in whole or in part, by you or by the undersigned, and the undersigned shall make payment of such obligations and indebtedness upon demand.

6. Liability for Costs of Collection

The reasonable costs and expenses of collection of the debit balance and any unpaid deficiency in the accounts of the undersigned with you, including, but not limited to, attorneys fees, incurred and payable or paid by you shall be payable to you by the undersigned.

7. Pledge of Securities and Other Property

All securities and other property now or hereafter held, carried or maintained by you in your possession in any of the accounts of the undersigned may be pledged and repledged by you from time to time, without notice to the undersigned, either separately or in common with other such securities and other property for any amount due in the accounts of the undersigned, or for any greater amount, and you may do so without retaining in your possession or under your control for delivery a like amount of similar securities or other property.

8. Margin Requirements and Credit Charges

The undersigned will at all times maintain such securities and other property in the accounts of the undersigned for margin purposes as you shall require from time to time and the monthly debit balances or adjusted balances in such accounts shall be charged, in accordance with your usual custom, with interest at a rate permitted by the laws of the State of New York.

9. ACCOUNTS CARRIED AS CLEARING BROKER

If you are carrying the account of the undersigned as clearing broker by arrangement with another broker through whose courtesy the account of the undersigned has been introduced to you, then until receipt from the undersigned of written notice to the contrary, you may accept from such other broker, without inquiry or investigation by you (i) orders for the purchase or sale in said account of securities and other property on margin or otherwise, and (ii) any other instructions concerning said account. You shall not be responsible or liable for any acts or omissions of such other broker or its employees.

10. PRESUMPTION OF RECEIPT OF COMMUNICATIONS

Communications may be sent to the undersigned at the address of the undersigned or at such other address as the undersigned may hereafter give you in writing, and all communications so sent, whether by mail, telegraph, messenger or otherwise, shall be deemed given to the undersigned personally, whether actually received or not.

11. AGREEMENT TO ARBITRATE CONTROVERSIES

It is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., as the undersigned may elect. If the controversy involves any security or commodity transaction or contract related thereto executed on an exchange located outside the United States, then such controversy shall, at the election of the undersigned, be submitted to arbitration conducted under the constitution of such exchange or under the provisions of the Constitu-

tion and Rules of the Board of Governors of the New York Stock Exchange, Inc. or the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc. Arbitration must be commenced by service upon the other of a written demand for arbitration or a written notice of intention to arbitrate, therein electing the arbitration tribunal. In the event the undersigned does not make such designation within five (5) days of such demand or notice, then the undersigned authorizes you to do so on behalf of the undersigned.

12. THE LAWS OF THE STATE OF NEW YORK GOVERN

This agreement and its enforcement shall be governed by the laws of the state of New York; shall cover individually and collectively all accounts which the undersigned may open or reopen with you; and shall enure to the benefit of your successors whether by merger, consolidation or otherwise, and assigns, and you may transfer the accounts of the undersigned to your successors and assigns, and this agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the undersigned.

13. EXTRAORDINARY EVENTS

You shall not be liable for loss caused directly or indirectly by government restrictions, exchange or market rulings, suspension of trading, war, strikes, or other conditions beyond your control.

14. REPRESENTATION AS TO CAPACITY TO ENTER INTO AGREEMENT

The undersigned represents that the undersigned is of full age, that the undersigned is not an employee of any exchange, or of any corporation of which any exchange owns a majority of the capital stock, or of a member of

any exchange, or of a member firm or member corporation registered on any exchange or of a bank, trust company, insurance company or of any corporation, firm or individual engaged in the business of dealing either as broker or as principal in securities, bills of exchange, acceptances or other forms of commercial paper. The undersigned further represents that no one except the undersigned has an interest in the account or accounts of the undersigned with you.

15. PURPOSE OF CREDIT

The undersigned acknowledges and agrees that credit extended hereafter to the undersigned in this account is primarily for investment or business purposes.

16. JOINT AND SEVERAL LIABILITY

If the undersigned shall consist of more than one individual, their obligations under this agreement shall be joint and several.

17. SEPARABILTIY

If any provision or condition of this agreement shall be held to be invalid or unenforceable by any court, or regulatory or self-regulatory agency or body, such invalidity or unenforceability shall attach only to such provision or condition. The validity of the remaining provisions and conditions shall not be affected thereby and this agreement shall be carried out as if any such invalid or unenforceable provision or condition were not contained herein.

18. HEADINGS ARE DESCRIPTIVE

The headings of each provision hereof is for descriptive purposes only and shall not be deemed to modify or

qualify any of the rights or obligations set forth in each such provision.

X FOR USE BY INDIVIDUALS, INCLUDING JOINT ACCOUNTS:

Signature; DAVID DELMAN

Signature: _____

(Second Party, if Joint Account)

Date: _____

X FOR USE BY SPECIAL ACCOUNTS ONLY: EXAMPLES — TRUSTS AND PARTNERSHIPS

Applicant (Account Title): _____

(Please Print)

By (Signature): _____

By (Signature): _____

(Examples: Trustee, General Partner) (Please Print)

By (Signature): _____

Title: _____

(Examples: Trustee, General Partner) (Please Print)

Date: _____

LENDING AGREEMENT

To: Merrill Lynch, Pierce, Fenner & Smith Incorporated, New York, New York

You are hereby specifically authorized to lend to yourselves, as principal or otherwise, or to others, any securities held by you on margin for any accounts of the undersigned or as collateral therefor, either separately or with other securities.

This agreement shall enure to the benefit of your successors, by merger, consolidation or otherwise, and assigns, and you may transfer the account of the undersigned to any such successors or assigns.

X FOR USE BY INDIVIDUALS, INCLUDING JOINT ACCOUNTS

Signature: DAVID DELMAN

Signature: _____
(Second Party, if Joint Account)

Date: _____

X FOR USE BY SPECIAL ACCOUNTS ONLY: EXAMPLES — TRUSTS AND PARTNERSHIPS

Applicant (Account Title): _____
(Please Print)

By (Signature): _____

Title: _____
Examples: Trustee, General Partner) Please Print)

By (Signature): _____

Title: _____
(Examples: Trustee, General Partner) (Please Print)

Date: _____

STANDARD OPTION AGREEMENT
INDIVIDUAL AND JOINT ACCOUNTS ONLY

Gentlemen:

In connection with any transaction executed by you on my behalf for the purchase and sale of put and call options, I agree as follows:

1. All transactions shall be subject to the constitution, rules, regulations, customs, and usages of the exchange, or market and its clearing house, if any, where executed. I further agree that I will not, either alone or in concert with others violate the position or exercise limits which the Exchanges or marketplace where executed, may establish from time to time as set forth in the prospectus of the Options Clearing Corporation ("OCC").

2. In the case of options sold or written by me in a cash account:

   (a) With respect to a call option which if exercised against me will require the delivery of securities sold, I will keep such securities in my account with you until the expiration of the option period, and will not sell or withdraw such securities. If the option is exercised, you may deliver such securities to the purchaser without previous notice to me.

   (b) With respect to any put option which if exercised against me will require payment for securities purchased, I will keep in my account sufficient funds for such payment until the expiration of the option period, and will not withdraw such funds or utilize them for any purpose. If the option is exercised you may use such

funds for the purchase of such securities without previous notice to me.

3. Any securities and funds held by you in any account of mine with you shall be held by you as security for the performance by me of my obligations to you under this agreement.

4. As option transactions involve a high degree of risk, I understand that:

   (a) I should not purchase an option unless I am able to sustain a total loss of the premium and transaction costs, and I should not write a call option unless I either own the underlying security (or a security convertible, exchangeable, or exercisable into such underlying security) or am able to sustain substantial financial losses, and that I should not write a put option unless I am able to sustain substantial financial losses.

   (b) I may not be able to close a position in the event that a secondary market in the option ceases to exist or the listing exchange restricts or suspends trading in the option.

5. I have been advised of and agree to abide by your policies and federal regulations regarding margining of options and related transactions.

6. I agree to advise you of any changes in my financial situation and needs, experience, or investment objectives.

7. In case of my insolvency, death or attachment of my property, you may, with respect to any pending options, take such steps as you consider necessary to protect yourself against loss.

8. Any agreement by me with you, whether previously or hereafter made applicable to any account of mine

with you, shall also apply to such option transactions except to the extent which it conflicts with this agreement. In the event of a conflict, this agreement shall control, and where this is no conflict, each provision of each agreement shall apply.

9. Any controversy between us arising out of such option transactions or this agreement shall be settled by arbitration only before the National Association of Securities Dealers, Incorporated, or the New York Stock Exchange, or an Exchange located in the United States upon which listed options transactions are executed. I shall have the right of election as to which of the foregoing tribunals shall conduct the arbitration. Such election is to be by registered mail, addressed to Merrill Lynch's head office at 165 Broadway, New York, N.Y. 10080, attention of the Law Department. The notice of election is to be postmarked five days after the date of your demand to make such election. At the expiration of the five days, I hereby authorize Merrill Lynch to make such election on my behalf.

10. I understand that exercise assignment notice for option contracts are allocated among customer short positions in accordance with the date of the transaction which established the short position. Positions which were established earliest will be assigned first ("First-In, First-Out"). A more detailed description of MLPF&S's allocation procedure is available upon request.

11. Absent the written designation of an agent to transact business on my behalf (power of attorney), I alone may make trading decisions in my account; however, unless I give specific instructions to the contrary, you may exercise discretion in the selection

of the exchange or marketplace for the execution of dually traded options.

12. This agreement and its enforcement shall be governed by the laws of the State of New York.

I (WE) HAVE RECEIVED AND READ A CURRENT OPTION CLEARING CORPORATION PROSPECTUS AND ARE AWARE OF THE SPECIAL RISKS ATTENDANT TO OPTION TRADING. THE STATEMENTS CONTAINED ON THIS FORM ARE ACCURATE.

DAVID DELMAN	4-27-82
Customer's Signature	Date Signed
Spouse's Signature (Required for Joint Accounts)	Date Signed

OPTION INFORMATION-INDIVIDUAL & JOINT ACCOUNT

Personal and Financial Data Furnished By Customer

Account Number: 233-58933; Customer's Name: David Delman; Street Address: 137½ Dolphin Ave.; City: Seal Beach; State: California; Zip Code: 90740; Date of Birth, 7/4/57; No. of Dependents, 0; Home Phone Number: (213) 430-6814; Customer's Employer: Self-Employed; Retired ☐; Business Phone No.: same; Spouse's Name (If Applicable):

Customer's Approximate Annual Earnings: ☐ Below $25,000 — State Amount $_____; ☐ $25,000 — $50,000 ☐ $50,000 — $100,000 ☒ Over $100,000; Spouse's Approximate Income (If Applicable): $_____; Combined Total Annual Income From All Sources: $250,000; Customer's Liquid Assets: Cash: $100,000; Securities: $1.3 million; Total Liquid Assets: $1.4 million; Other Assets (Omit Equity in Home): ; Customer's Approximate Net Worth: $1.4 million.

Required Documents: ☐ Option Clearing Corp. Prospectus & Supplements Provided To Customer; Date Due - 4/21/81; Power of Attorney: ☐ Ltd. ☐ General; Name of Agent ; Code 108 Hypothecation Consent Form Signed By Customer, ☒ CMA; Investment Objectives: ☒ Income; ☒ Trading; ☒ Speculation; Does Customer Have Restricted Stock? ☐ Yes ☒ No; Is Customer A Control Person? ☐ Yes ☒ No; (If Yes, Shares of Restricted Stock or Stock Held by a Control Person, Except to the Extent Salable Under Rule 144, May Not Be Used To Cover A Short Position in Call Option Contracts, Satisfy Margin Requirements or Be Delivered Against Exercise of a Put or Call Option.)

Type of Option Trading Desired: ☒ Buy Calls; ☒ Buy Puts; ☒ Spreads; ☒ Write Calls: ☒ Covered; ☒ Uncovered;

☒ Write Puts; ☒ Combinations (Straddle, Etc.); List Accounts With Other Firms: 1. _____; 2 _____; Check All Investment Experience That Apply: ☐ Options ____ Yrs.; Stock ☐ Stock 5 Yrs.; ☐ Bonds ____ Yrs.; ☐ Commodities ____ Yrs.; ☐ Other (Specify) _____ Yrs.; Prior Trading Activity: ☐ Seldom; ☒ Moderate; ☐ Active

Declarations Approvals
To Be Completed By Office Manager
Prior To Option Trading

☒ Approved For Option Trading As Follows: ☒ Buy Calls; ☒ Buy Puts; ☒ Spreads; ☒ Write Calls: ☒ Covered; ☒ Uncovered; ☒Write Puts; ☒Combinations (Straddles, Etc.); Account Executive's Signature: Steven Hester; Date, 10/14/82; Manager's Signature (Must Be R.O.P. & Officer) Pat Tuohy; Date, 4/21/82; Registered Option Principal's Signature of Other Than Manager, Must Be Officer) Richard Ruffine; Date 5/5/82

District Court Decisions Concerning the Enforceability of Agreements to Arbitrate Section 10(b) Claims

A. Cases Holding Section 10(b) Claims Arbitrable

First Circuit

Arent v. *Shearson/American Express, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,523 (D. Mass. Dec. 20, 1985)

Mowbray v. *Moseley, Hallgarten, Estabrook & Weden, Inc.*, No. 83-2851-C (D. Mass. July 16, 1985), *vacated*, No. 85-1647 (1st Cir. July 3, 1986)

Prawer v. *Dean Witter Reynolds, Inc.*, 626 F. Supp. 642 (D. Mass. 1985)

Sevinor v. *Merrill Lynch, Pierce, Fenner & Smith*, No. 84-3240-N (D. Mass. July 19, 1985)

Second Circuit

Brener v. *Becker Paribas Inc.*, 628 F. Supp. 442 (S.D.N.Y. 1985)

Finkle & Ross v. *A.G. Becker Paribas, Inc.*, 622 F. Supp. 1505 (S.D.N.Y. 1985)

Ilan v. *Shearson/American Express, Inc.*, 632 F. Supp. 886 (S.D.N.Y. 1985)

Intre Sport Ltd. v. *Kidder Peabody & Co.*, 625 F. Supp. 1303 (S.D.N.Y. 1985), *modified*, Fed. Sec. L. Rep. (CCH) ¶ 92,714 (S.D.N.Y. Apr. 21, 1986)

Jarvis v. *Dean Witter Reynolds, Inc.*, 614 F. Supp. 1146 (D. Vt. 1985)

Johnson v. *Kidder Peabody & Co.*, No. 85 Civ. 178 (N.D.N.Y. July 29, 1985)

McMahon v. *Shearson/American Express, Inc.*, 618 F. Supp. 384 (S.D.N.Y. 1985), *aff'd in part, rev'd in part*, 788 F.2d 94 (2d Cir. 1986)

Shamir v. *Kidder, Peabody & Co.*, Fed. Sec. L. Rep. (CCH ¶ 92,511 (S.D.N.Y. Mar. 11, 1985)

Terra Resources I v. *Burgin*, Fed. Sec. L. Rep. (CCH) ¶ 92,703 (S.D.N.Y. Apr. 1, 1986)

Wall Street Assocs. v. *Becker Paribas, Inc.*, No. 85 Civ. 4649 (S.D.N.Y. Sept. 19, 1985)

Third Circuit

Baker v. *Paine, Webber, Jackson & Curtis, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,757 (D.N.J. Apr. 10, 1986)

Fourth Circuit

Fisher v. *Prudential-Bache Securities, Inc.*, No. Y-86-388 (D. Md. May 12, 1986)

Land v. *Dean Witter Reynolds, Inc.*, 617 F. Supp. 52 (E.D. Va. 1985)

Shotto v. *Laub*, 632 F. Supp. 516 (D. Md. 1986)

Fifth Circuit

Coonly v. *Rotan Mosle, Inc.*, No. A-83-CA-529 (W.D. Tex. June 11, 1985)

Frye v. *Paine, Webber Jackson & Curtis*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,516 (N.D. Tex. Dec. 26, 1985)

Hymel v. *Delta Petroleum & Energy Corp.*, No. SA-83-CA-362 (W.D. Tex. June 19, 1985)

Sixth Circuit

Gerhardstein v. *Shearson/American Express, Inc.* [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,512 (N.D. Ohio Mar. 10, 1986)

Moncrieff v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 623 F. Supp. 1005 (E.D. Mich. 1985)

Yee v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, No. 84-4017 (E.D. Mich. Mar. 31, 1986)

Seventh Circuit

Austad v. *Drexel Burnham Lambert, Inc.*, No. 85-C-9759 (N.D. Ill. Mar. 27, 1986)

Steinberg v. *The Illinois Co.*, No. 85-C-7131 (N.D. Ill. May 15, 1986)

Willis v. *Prudential-Bache Securities, Inc.*, No. L 85-0959 (N.D. Ind. July 10, 1985)

Eighth Circuit

Bob Ladd, Inc. v. *Adcock*, 633 F. Supp. 241 (E.D. Ark. 1986)

Houlihan v. *Schmacker* and *Meyer* v. *Schmacker*, Nos. 83-159 C(5) and 83-1356 C(5) (E.D. Mo. May 3, 1985)

Peele v. *Kidder, Peabody & Co. Inc.*, 620 F. Supp. 61 (W.D. Mo. 1985) (appeal pending)

Sulit v. *Dean Witter Reynolds, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,755 (W.D. Mo. Mar. 27, 1986)

Ninth Circuit

Anderson v. *Paine Webber Jackson & Curtis*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,446 (C.D. Cal. Sept. 23, 1985)

Byrd v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,225 (S.D. Cal. July 8, 1985) (on remand from Supreme Court)

Dees v. *Distenfield*, 618 F. Supp. 123 (C.D. Cal. 1985)

Geller v. *Nasser*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,409 (C.D. Cal. Nov. 18, 1985)

Jope v. *Bear Stearns & Co.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,393 (N.D. Cal. Nov. 15, 1985)

Mann v. *Foster & Marshall/American Express, Inc.*, No. C84-925D (W.D. Wash. June 3, 1985)

Marx v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,311 (C.D. Cal. Aug. 23, 1985)

Sacks v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,429 (C.D. Cal. Dec. 31, 1985)

Schultz v. *Robinson-Humphrey/American Express, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,515 (M.D. Ga. Mar. 4, 1986)

West v. *Drexel Burnham Lambert, Inc.*, 623 F.Supp. 26 (W.D. Wash. 1985)

Tenth Circuit

Blakely v. *Prudential-Bache Securities, Inc.*, No. A-85-442-BRT (D. Nev., Dec. 9, 1985)

Eleventh Circuit

Batteh v. *Prudential-Bache Securities, Inc.*, No. 84-452-Civ-J-14 (M.D. Fla. July 29, 1985)

Boyd v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 614 F.Supp. 940 (S.D. Fla. 1985)

Chandler v. *Drexel Burnham Lambert, Inc.*, No. C-85-1585-A (N.D. Ga. Oct. 29, 1985) (appeal pending)

Colangelo v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,365 (M.D. Fla. July 23, 1985)

Driscoll v. *Smith Barney, Harris Upham & Co.*, No. 84-8223 (S.D. Fla. June 6, 1985)

Finn v. *Davis*, 610 F. Supp. 1079 (S.D. Fla. 1985)

Greenstein v. *First Biscayne Corp.*, No. 82-0584 Civ. (S.D. Fla. May 16, 1985)

Gregory v. *Merrill Lynch, Pierce, Fenner & Smith*, No. 84-1647 Civ. 1-10 (M.D. Fla. Apr. 9, 1985)

Hashemi v. *Merrill Lynch, Pierce, Fenner & Smith*, No. C82-2948A (N.D. Ga. Aug. 6, 1985)

Miller v. *Drexel Burnham Lambert, Inc.*, 83-6871 (S.D. Fla. July 31, 1985), *rev'd*, Fed. Sec. L. Rep. (CCH) ¶ 92,783 (11th Cir. June 17, 1986) (per curiam)

Niven v. *Dean Witter Reynolds, Inc.*, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,059 (M.D. Fla. Mar. 28, 1985)

Pruzan v. *Paine, Webber, Jackson & Curtis*, No. C84-2016A (N.D. Ga. Aug. 30, 1985)

Raiford v. *Merrill Lynch, Pierce, Fenner & Smith*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,269 (N.D. Ga. May 16, 1985)

Rockoff v. *Shearson Lehman/American Express, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,513 (S.D. Fla. Feb. 12, 1986)

Ross v. *Mathis*, 624 F. Supp. 110 (N.D. Ga. 1985)

Sanders v. *Robinson Humphreys/American Express, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,548 (N.D. Mar. 27, 1986)

Schultz v. *Robinson Humphreys/American Express, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,515 (M.D. Ga. Mar. 4, 1986)

Walch v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,060 (M.D. Fla. Apr. 25, 1985)

Westwind Transp., Inc. v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 83-734 (M.D. Fla., Apr. 9, 1985)

B. Cases Holding Section 10(b) Claims Not Arbitrable

District of Columbia Circuit

Kalali v. *Prudential-Bache Securities, Inc.*, No. 85-3237 (D.D.C. June 30, 1986)

Second Circuit

Becker v. *Silverman*, 638 F. Supp. 193 (S.D.N.Y. 1986)

Brill v. *Prudential-Bache Securities, Inc.*, No. 84 Civ. 0846 (S.D.N.Y. June 13, 1986)

Couvaris v. *Paine Webber Jackson & Curtis Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,554 (S.D.N.Y. Feb. 24, 1986)

Clark v. *Kidder, Peabody & Co., Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,729 (S.D.N.Y. May 9, 1986)

Farino v. *Advest Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,758 (E.D.N.Y. May 1, 1986)

Gilmore v. *Shearson/American Express, Inc.*, No. 84 Civ. 9011 (S.D.N.Y. May 20, 1986)

Intre Sport, Ltd v. *Kidder, Peabody & Co.*, Fed. Sec. L. Rep. (CCH) ¶ 92,714 (S.D.N.Y. Apr. 21, 1986), *aff'd*, 795 F.2d 1004 (2d Cir. 1986), *pet. for cert. filed*, No. 86-40 (July 16, 1986)

IRPA Corp. v. *Shearson/American Express, Inc.*, No. 85 Civ. 1629 (S.D.N.Y. May 28, 1986)

Leone v. *Advest, Inc.*, 624 F. Supp. 297 (S.D.N.Y. 1985)

Levine v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,841 (S.D.N.Y. July 22, 1986)

Luce v. *Edelstein, et al.*, Fed. Sec. L. Rep. (CCH) ¶ 92,258 (Aug. 8, 1985)

Rush v. *Oppenheimer & Co.*, No. 84 Civ. 3219 (S.D.N.Y. June 27, 1986) (dicta) (decided after *McMahon*)

Weizman v. *Adornato*, 625 F. Supp. 1101 (E.D.N.Y. 1985)

Third Circuit

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Burris v. *Paine Webber, Jackson & Curtis, Inc.*, No. 85-5517 (D.N.J. 1985), *aff'd*, 797 F.2d 1197 (3d Cir. 1986)

Erlbaum v. *Prudential-Bache Securities, Inc.*, No. 84-5541 (E.D. Pa. Aug. 9, 1985)

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Fourth Circuit

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Levendag v. *Churchill,* 623 F. Supp. 620 (D.S.C. 1985)

Fifth Circuit

Bustamante v. *Rotan Mosle, Inc.,* 633 F. Supp. 303 (S.D. Tex. 1986)

Cummings v. *A.G. Edwards & Sons, et al.,* 637 F. Supp. 132 (M.D. La. 1986).

King v. *Drexel Burnham Lambert, Inc.,* No. 3-Civ-85-000-932-P (N.D. Tex. Oct. 29, 1985), *aff'd,* No. 85-1717 (5th Cir. May 28, 1986)

Woodyard v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. H-85-5615 (S.D. Tex. July 10, 1986)

Sixth Circuit

Sterne v. *Dean Witter Reynolds, Inc.,* No. C-1-85-124 (S.D. Ohio Jan. 18, 1986) (appeal pending)

Seventh Circuit

Barr v. *The Illinois Co.,* No. 84-C-2076 (N.D. Ill. Oct. 29, 1985)

Gibson v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 84-C-7542 (N.D. Ill. June 18, 1985)

Goldberg v. *Drexel Burnham Lambert, Inc.,* No. 83-C-8586 (N.D. Ill. Jan. 15, 1986)

Robert A. Stone & Assocs. v. *Drexel Burham Lambert, Inc.,* No. 85-C-6927 (N.D. Ill. Nov. 15, 1985)

Winkler v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 85-C-9120 (N.D. Ill. Apr. 25, 1986)

Eighth Circuit

Bale v. *Dean Witter Reynolds, Inc.* and *Haertel* v. *Dean Witter Reynolds, Inc.*, 627 F. Supp. 650 (D. Minn. 1986)

Nesslage v. *York Securities, Inc.*, 107 F.R.D. 389 (E.D. Mo. 1985) (appeal pending)

Webb v. *R. Rowland & Co.*, 613 F. Supp. 1123 (E.D. Mo. 1985) (appeal pending)

Ninth Circuit

Rhoades v. *Powell, et al.*, No. CV-F-85-549 (E.D. Cal. Sept. 5, 1986)

Schnitzer v. *Oppenheimer & Co.*, 633 F. Supp. 92 (D. Ore. 1985)

Tenth Circuit

Adams v. *Merrill Lynch, Pierce Fenner & Smith, Corp.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,328 (W.D. Okla. Sept. 20, 1985)

Coffey v. *Dean Witter Reynolds, Inc. et al.*, No. 8-K-2256 (D. Colo. July 16, 1986)

Eleventh Circuit

Gorman v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 609 F. Supp. 1054 (S.D. Fla.), *aff'd*, 780 F.2d 1032 (11th Cir. 1985) (*en banc* rehearing pending)

Krieck v. *Dean Witter Reynolds, Inc.*, No. GCA 84-0085 (N.D. Fla. Apr. 24, 1985)

Rojas Cancanon v. *Smith Barney, Harris Upham & Co.*, 612 F. Supp. 996 (S.D. Fla. 1985)

Scharp v. *Cralin & Co.*, 617 F. Supp. 476 (S.D. Fla. 1985)

Wolfe v. *E. F. Hutton & Co.,* No. 84-151-Civ.-Orl-18 (M.D. Fla. Mar. 30, 1985)

C. Case Stayed Pending Eighth Circuit Decision in *Phillips*

Minnesota Odd Fellows Home Foundation v. *Engler & Budd Co.,* 630 F. Supp. 797 (D. Minn. Mar. 2, 1986)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 21, 1986, I served the within Petition for a Writ of Certiorari in re: "Merrill Lynch, Pierce, Fenner & Smith Inc. vs. David Delman" in the United States Supreme Court, October Term 1986, No. .....;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Dale F. Kinsella, Esq.
Kinsella, Boesch, Fujikawa & Toole
1875 Century Park East
Suite 1600
Los Angeles, CA 90067

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 21, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

(N)

Supreme Court, U.S.
FILED
JAN 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-668

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,
Petitioner,

v.

DAVID DELMAN,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 86-668

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,
Petitioner,

v.

DAVID DELMAN,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, David Delman ("Delman"), respectfully prays that Merrill Lynch, Pierce, Fenner & Smith Inc.'s ("Merrill Lynch") Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case be denied.

STATUTORY PROVISIONS

The following statutory provisions are also relevant to this case:

1. Securities Exchange Act of 1934, Section 29(a), 15 U.S.C. § 78cc(a).

2. Securities Exchange Act of 1934, Section 27, 15 U.S.C. § 78aa.

The Appendix to this response sets forth the pertinent text of the statutory provisions. (1a)[1].

STATEMENT OF THE CASE

In addition to the factual and procedural background set forth in Merrill Lynch's petition, the following procedural history is significant.

On July 25, 1985 the United States District Court, Central District of California, entered its Amended Memorandum and Order (the "Order") ordering Delman's pendent state claims to arbitration and retaining jurisdiction of Delman's federal securities claims under the Securities Exchange Act of 1934, as amended (the "1934 Act"). (Petition, 3a).[2] Thereafter, Delman filed a Motion for Reconsideration of the Order requesting the district court to amend the Order to include a factual finding that Delman lacked the mental capacity to enter into the Customer and Option Agreements with Merrill Lynch. (Petition, 16a and 24a, respectively.) The district court denied Delman's motion but specifically stated that the issue of Delman's mental capacity to enter into the agreements was still an open issue to be decided by the district court. The Reporters Transcript of Proceedings is reprinted in the Appendix at 3a. As discussed *infra*, if the district court determines that Delman was not mentally competent at the time he signed the Merrill Lynch agreements, then the agreements are revocable and the issue presented in Merrill Lynch's petition shall become moot.

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[1]Citations to material printed in the attached appendix appear as "____a."

[2]Citations to material printed in the Appendix annexed to Merrill Lynch's petition appear as "Petition, ____a."

Delman filed a third amended complaint in the district court in May 1986 pursuant to the district court's order granting Delman leave to file the amended pleading. The amended complaint contains claims under the Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1962(b), 1962(c) and 1964(c) and a claim for rescission. Merrill Lynch answered the amended complaint and did not file a motion with the district court to compel arbitration of those claims.

SUMMARY OF ARGUMENT

1. The issue presented in Merrill Lynch's petition is not ripe for consideration in this case. The federal district court has left upon for future consideration the issue of whether Delman was mentally competent to enter into the Merrill Lynch Customer and Option Agreements. Under applicable California state law, a contract is revocable if a person was not mentally competent to deal with the subject matter of the contract with a full understanding of his rights. Delman contends that medical evidence available at the time he signed the Customer and Option Agreements demonstrates his lack of mental capacity to enter into a binding and enforceable contract. Therefore, if the district court, upon deciding the issue of Delman's mental capacity, concludes Delman was incompetent to enter into the Merrill Lynch agreements, then Merrill Lynch's petition will become moot.

2. The Ninth Circuit decisions in *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986) and in this case are not in conflict with any decision rendered by this Court. Congressional intent deducible from the text of the 1934 Act and its legislative history demonstrates that the implied right of action under Section 10(b), and

Rule 10b-5 promulgated thereunder, is not subject to predetermined arbitration by contract.

REASONS FOR DENYING THE WRIT

I

MERRILL LYNCH'S PETITION FOR WRIT OF CERTIORARI IS NOT RIPE.

This Court can deny a Petition for Writ of Certiorari where the case is not yet ripe for review. *See, e.g., Brotherhood of Loc. Fire Eng. v. Bangor & A.R. Co.*, 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967). In the instant case, the district court has stated that a substantial issue remains open — did Delman have the mental competency to enter into the Customer and Option Agreements with Merrill Lynch. (3a).

If the district court determines that Delman lacked sufficient mental capacity to enter into the Merrill Lynch agreements, then it must rule under California law that the agreements are revocable. *Burgess v. Security-First Nat. Bank of Los Angeles*, 44 Cal. App. 2d 808, 113 P.2d 298 (1941); California Civil Code, §39. Such a determination by the district court would render Merrill Lynch's petition moot since the Customer and Option Agreements contain the arbitration clauses which are at issue.[3]

This case is not ripe for review because the critical issue regarding Delman's capacity to contract remains

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[3]The United States Arbitration Act provides that a provision in a written contract to settle a controversy by arbitration is invalid and revocable "upon such grounds as exist at law or in equity for the revocation of any contract." Arbitration Act, 9 U.S.C. §2. The district court ruled in the Order that "state law determines the enforceability of a particular agreement." (Petition, 8a.)

open for determination by the district court in a future proceeding (14a). The district court should be allowed to try the competency issue first before this Court proceeds with a review of the issue presented in Merrill Lynch's petition because such a review may be unnecessary for a final disposition of this case.

II

THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH ANY DECISION RENDERED BY THIS COURT.

The decisions reached by the Ninth Circuit in this case and in *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986) are not in conflict with any decision rendered by this Court, including *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. ____, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Decisions by the other circuits holding that claims arising under Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78j(b) (the "1934 Act"), and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, are not subject to arbitration under the United States Arbitration Act, Ch. 392, 61 Stat. 670 (1947) (Codified at 9 U.S.C. §1 *et seq.*) (the "Arbitration Act") are also not in conflict. In fact, both *Mitsubishi* and *Scherk v. Alberto-Culver Company*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) implicitly support the decision rendered by the Ninth Circuit in *Conover* and the instant case.

It is unquestioned that at issue in this case is the conflict between the statutory dictates and policies of the Arbitration Act and the 1934 Act. The Arbitration Act provides that a valid contract containing a provision to arbitrate a controversy arising out of the contract shall be

enforced except "upon such grounds as exist at law or equity for the revocation of any contract." Arbitration Act, 9 U.S.C. §2. Conversely, §29(a) of the 1934 Act mandates that any agreement binding a person to waive the right to a judicial forum is void. *Mitsubishi* expressly recognized that the dictates of the Arbitration Act would directly conflict with the dictates of other federal statutes, such as the 1934 Act. This Court concluded in *Mitsubishi* that "not ... all controversies implicating statutory rights are suitable for arbitration." 473 U.S. at ____, 105 S.Ct. at 3355. To resolve apparent statutory conflicts, this Court held that:

> "[I]t is the *congressional intention expressed in some other statute* on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable."

Id. at ____, 105 S.Ct. at 3355 (emphasis added). (Citations omitted.)

Congressional intent "will be deducible from text or legislative history." *Id.* Thus, if the statutory language of the 1934 Act or the legislative history supporting the 1934 Act and its amendments evidences a congressional intent that the private right of action under section 10(b) be tried in a judicial forum, then such claims are not subject to predetermined agreements to arbitrate. Therefore, the specific issue before this Court is whether the congressional intent deducible from the language of 1934 Act or legislative history prohibits arbitration of claims arising under section 10(b) of the 1934 Act.

The Ninth Circuit, contrary to Merrill Lynch's contention that its analysis was "both erroneous and unneces-

sary" (Petition, page 10), expressly followed the analysis dictated by *Mitsubishi*:

> "To determine Congress' intent, we study the text, and both the legislative and judicial history of the 1934 Act, with due regard for the purposes underlying the securities and arbitration statutes."

Conover, 794 F.2d at 523.

A. The Statutory Text of the 1934 Act Evidences Congress' Intent That Implied Rights Of Action Under Section 10(b) Are Not to be Arbitrated

In *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), this Court first recognized and addressed the tension between the respective policies of the Arbitration Act and the Securities Act of 1933, as amended (the "1933 Act"). *Wilko* involved a claim under section 12(2) of the 1933 Act, 15 U.S.C. § 771(2), which creates a right of recovery for misrepresentation in the sale of securities. The parties had entered into margin agreements containing a provision that any controversies arising between them in the future would be arbitrated. This Court held that such an agreement was void under the non-waiver provision contained in section 14 of the 1933 Act, which provides:

> "Any condition, *stipulation* or provision binding any person acquiring any security *to waive* compliance with any provision of this subchapter or the rules and regulations of the Commission *shall be void*."

15 U.S.C. § 77n (emphasis added).

In reaching its result, this Court concluded that an agreement to arbitrate was a "stipulation" and the right to a judicial forum granted under section 22(a) of the 1933 Act, 15 U.S.C. § 77v(a), for any violation of such act,

was a "provision" that could not be waived under § 14 of the 1933 Act even in light of the language and policies of the Arbitration Act. *Wilko*, 346 U.S. at 434-35, 74. S.Ct. at 186.

The 1934 Act contains a non-waiver provision virtually identical to section 14 of the 1933 Act. Section 29(a) of the 1934 Act provides:

> "Any condition, *stipulation* or provision binding any person *to waive* compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby *shall be void.*"

15 U.S.C. § 78cc(a) (emphasis added).

Likewise, section 27 of the 1934 Act, 15 U.S.C. § 78aa, is virtually identical to section 22(a) of the 1933 Act in granting a right to a judicial forum for violation of "provisions" of the 1934 Act.[4]

Even though the non-waiver provisions of the 1933 Act and 1934 Act are essentially identical, Merrill Lynch contends that a 10(b) claim under the 1934 Act is not entitled to the same protection of a non-waivable judicial forum as a 12(2) claim under the 1933 Act because the former is a judicially implied right while the latter is an expressly stated right. Such a contention is without merit.

Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) was the first case to recognize an implied right of action under section 10(b). *Kardon* is instructive on fully understanding the status of the law in the period in which the 1934 Act was written and thus sheds light on

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[4]The 1934 Act provides, (i) greater venue choices than does the 1933 Act, and (ii) exclusive jurisdiction in the federal court while the 1933 Act grants concurrent jurisdiction to federal and state courts.

the meaning of the actual text of section 10(b). Utilizing this Court's opinion in *Texas & Pacific R. Co. v. Rigsby* for concluding that Congress intended a private right of action for section 10(b) violations, the *Kardon* court held:

> "It is also true that there is no provision in Sec. 10 or elsewhere expressly allowing civil suits by persons injured as a result of violation of Sec. 10 or the Rule. However, 'the violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the action liable for an invasion of an interest of another if; (a) *the intent of the enactment* is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is *intended to protect.* ***Restatement, Torts, Vol. 2, Sec. 286. This rule is more than merely a canon of statutory interpretation. The disregard of the command of a statute is a wrongful act and a tort. As was said in *Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874, 'This is but an application of the maxim, Ubi jus ibi remedium.'"

Kardon, 69 F.Supp. at 513 (emphasis added).

The *Kardon* court concluded that 10(b) set forth a fundamental right of statutory protection mandated by the "general law" at that time and to withhold such a private right of action would have required Congress to have stated expressly its intention to withhold a right of action; such language should have appeared "very clearly and plainly." *Id.* at 514. Since Congress did not withhold a right of action in "clear and plain" language, the *Kardon* court concluded that the text of the statute itself evidenced Congress' intent to allow a private right of action under 10(b). "[T]he mere omission of an express provision for civil liability is not sufficient to negative

what the general law implies." *Id.* In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Curran,* 456 U.S. 353, 378, 102 S.Ct. 1825, 1839, 72 L.Ed.2d 182 (1982), this Court expressly adopted the type of inquiry engaged in by the *Kardon* court in a different context:

> "In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, *the initial focus must be on the state of the law at the time the legislation was enacted.*" (emphasis added).

See, Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

In *Superintendent of Ins. of St. of N.Y. v. Bankers L.&C. Co.,* 404 U.S. 6, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971), this Court first acknowledged that a private claim could be asserted on the basis of violations of Rule 10b-5. By endorsing a private remedy under section 10(b), this Court implicitly recognized the *Kardon* decision, and its express finding that the statutory language itself evidenced Congress' intent to grant a private action under section 10(b). *Id.* at 12, 92 S.Ct. at 169.

More recently, this Court in a unanimous decision reaffirmed its recognition of a private right of action under 10(b) and Rule 10b-5 and held that, "the existence of this implied remedy is simply beyond preadventure." *Herman & MacLean v. Huddleston,* 459 U.S. 375, 380, 103 S.Ct. 683, 686, 74 L.Ed.2d 548 (1983). *Herman & MacLean* is particularly instructive given this Court's holdings in *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) and *Merrill Lynch, Pierce, Fenner & Smith v. Curran. Cort v. Ash* established the criteria for determining the availability of implied private actions. Critical to that determination is a finding of either ex-

plicit or implicit legislative intent to create or deny such a remedy. *Cort,* 422 U.S. at 78, 95 S.Ct. at 2088. *Curran* further clarified the approach for determining implied actions by stating that the Court's focus "must be on the 'intent of Congress'." *Curran,* 456 U.S. at 377, 102 S.Ct. at 1839. *MacLean & Huddleston's* affirmation of the existence of a private right of action under section 10(b), after the decisions in *Cort v. Ash* and *Curran,* establish that this Court has already found that Congress intended a private remedy under section 10(b). [5]

B. The Legislative History of the 1934 Act Evidences Congress' Intent That Implied Rights of Action Under Section 10(b) Are Not to Be Arbitrated

On June 4, 1975, Congress adopted the Securities Acts Amendments of 1975. Pub. L. 94-29, 89 Stat. 97. These amendments were the "most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange Act of 1934." *Herman & MacLean,* 459 U.S. at 384, 103 S.Ct. at 688, quoting Hearings on S. 249 before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess., 1 (1975). At the time of these amendments, the existence of a private cause of action under section 10(b) and Rule 10b-5 had been recognized by 10 of the 11 Courts of Appeals. *Id.* at 380, n.10, 103 S.Ct. at 686, n.10.

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[5]Merrill Lynch's contention that this Court's opinion in *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) holds otherwise is without merit. *Scherk* was expressly limited to situations involving international comity. This Court stated:

> "Concededly, situations may arise where the contacts with foreign countries are so insignificant or attenuated that the holding in *Wilko* would meaningfully apply."

Id at 517, n.11, 94 S.Ct. at 2456, n.11.

Justice Stevens, writing for a majority of the Court in *Curran,* held that implied claims under the Commodity Exchange Act, 7 U.S.C. 1 *et seq.* (the "Commodity Act"), were routinely recognized by the lower courts in 1974 when Congress extensively amended that act. This Court concluded that Congress' re-enactment of the Commodity Act in light of judicial decisions implying a private remedy demonstrated that Congress intended to preserve such a remedy. *Curran,* 456 U.S. at 381-82, 102 S.Ct. at 1841.

Likewise, the 1975 amendments to the 1934 Act left section 10(b) intact in light of numerous judicial decisions over approximately 40 years, including this Court's decision in *Superintendent of Ins. of St. of N.Y. v. Bankers L.&C. Co.,* holding a private right of action exists under section 10(b). Congress' "re-enactment" of the 1934 Act, in light of the "contemporary legal context", demonstrates that Congress ratified the implied private right of action under section 10(b) as a part of the 1934 Act. *Herman & MacLean,* 459 U.S. at 385-86, 103 S.Ct. at 689.

The House Conference Report on the 1975 Amendments also affirms that Congress intended section 10(b) and Rule 10b-5 to provide a private remedy. In a discussion of its amendment to section 28 of the 1934 Act, the House Conference Report emphasized Congress' intent that arbitration agreements would not be permitted between brokers and customers for violations of the 1934 Act:

> "It was the *clear understanding* of the conferees that this amendment did not change existing law, as articulated in *Wilko v. Swan* . . . concerning the effect of arbitration proceeding provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations."

H.R. Rep. No. 229, 94th Cong., 1st Sess. 111, *reprinted in* 1975 U.S. Code Cong. & Ad. News 342. (emphasis added). The legislative history of the 1934 Act provides a compelling account of Congress' intent that the doctrine of *Wilko v. Swan* apply in the 10b-5 context.

C. Policies Underlying the Federal Securities Laws Mandate A Judicial Forum For Section 10(b) Claims.

Congress' intent that private claims under section 10(b) and Rule 10b-5 of the 1934 Act not be subject to arbitration between a customer and broker is clear from the text of the statute itself and the legislative history. Merrill Lynch's contention that inconsistency in decisions exists over the issue of arbitrability of section 10(b) claims is without support upon review of this Court's prior decisions as outlined *supra.* Further, the policies supporting the 1934 Act, and the protections granted to parties for violations thereof, would be significantly diminished without a judicial forum for section 10(b) claims.

The fundamental purpose of the 10b-5 remedy is to protect vulnerable purchasers of securities from the aggressive and more sophisticated buyer or seller. *Wilko v. Swan* recognized this inherent policy in holding that such protective aspect outweighed any policy interest in quick resolution of disputes through arbitration. This Court has emphasized that "the '33 and '34 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 206, 96 S.Ct. 1375, 1387, 47 L.Ed.2d 668 (1976).

In *Herman & MacLean,* this Court held that Congress' decision to leave section 10(b) intact with a private

remedy for violations thereof furthered the "broad remedial purposes" of the securities laws. 459 U.S. at 386, 103 S.Ct. at 689. "Rule 10b-5 is, after all, the most important remedy in both Acts." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Morre,* 590 F.2d 823, 829 (10th Cir. 1978). The broad remedial purposes of the securities laws cannot be enforced if private actions are forced into arbitration.

The purpose of section 29(a) of the 1934 Act is to prevent the waiver of a right to a judicial forum because of the startling and unquestioned fundamental differences between litigation in a federal court and arbitration:

> (1) 10b-5 requires a subjective finding on the "purpose and knowledge of an alleged violator." *Conover,* 749 F.2d at 526. This Court held in *Wilko v. Swan* that such questions are ill-determined by arbitrators without judicial instruction on the law. *Wilko v. Swan,* 346 U.S. at 435, 74 S.Ct. at 187; *Scherk v. Alberto-Culver Company,* 417 U.S. at 532, 94 S.Ct. at 2463.
>
> (2) An arbitration award can be made "without explication of reasons and without development of a record so that an arbitrator's" concept of this Court's statutory requirements may be fundamentally incorrect, "yet functionally unreviewable," because there is no judicial review corresponding to review of court decisions. *Id.*
>
> (3) Extensive pretrial discovery provided by the Federal Rules of Civil Procedure would not be available. *Scherk v. Alberto-Culver Company,* 417 U.S. at 532, 94 S.Ct. at 2463. This right is particularly significant in securities cases where most of the

relevant documentation to support a 10b-5 claim is held by the brokerage firm.

(4) The wide choice of venue provided by 15 U.S.C. § 78aa of the 1934 Act would be forfeited. *Id.*

Therefore, the loss of a judicial forum carries with it the loss of substantial rights. This Court has previously held that a waiver of a judicial trial and review is simply inconsistent with Congress' overriding concern for the protection of investors. *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182 (1953). The non-waiver provision of § 29(a) was designed to prohibit a party of greater strength from causing an unsophisticated individual to waive the same substantial rights present in *Wilko v. Swan*. All of these factors, in light of Congress' intent as evidenced by the statutory text of the 1934 Act and its legislative history, demonstrate that Congress intended to preclude enforcement of predispute agreements requiring arbitration of a section 10(b) claim.

CONCLUSION

A review of the issue in the instant case by this Court is premature as the issue is not ripe. This Court's prior decisions, including the recent unanimous decision in *Herman & MacLean v. Huddleston*, clearly evidence that section 10(b) claims are not subject to predispute agreements to arbitrate. The Ninth Circuit decisions in *Conover v. Dean Witter Reynolds, Inc.* and this case are not in conflict with any decision rendered by this Court. Delman respectfully requests that Merrill Lynch's Petition for

Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

January 7, 1987

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS

Securities Exchange Act of 1984, Section 29(a), 15 U.S.C. § 78cc(a):

> "(a) Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

Securities Exchange Act of 1984, Section 27, 15 U.S.C. § 78aa:

> "The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291

and 1292 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts."

No. CV 84-3869-MRP

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MARIANA R. PFAELZER, JUDGE PRESIDING

DAVID DELMAN,
Plaintiff,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Monday, September 30, 1985

APPEARANCES:

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LOS ANGELES, CALIFORNIA;
MONDAY, SEPTEMBER 30, 1985; 10:00 A.M.

THE CLERK: Item No. 5, Civil 84-3869, David Delman versus Merrill Lynch, Pierce, Fenner & Smith.

Counsel, please state your appearance.

MR. KINSELLA: Good morning, your Honor, Dale Kinsella.

MR. SWANK: William Swank on behalf of defendant Merrill Lynch.

THE COURT: Well, Mr. Kinsella, why did it take so long?

MR. KINSELLA: I came prepared to speak about jurisdiction, your Honor.

THE COURT: All right. You go ahead and speak about it.

MR. KINSELLA: I am only being partially facetious. I don't believe there is a serious question regarding jurisdiction. If your Honor does, I am prepared to address it.

THE COURT: There is a very serious problem about jurisdiction.

MR. KINSELLA: I had a suspicion that your Honor was of that state of mind. Can I spend two minutes clarifying the situation because I am convinced there certainly is jurisdiction in this case.

First, if you will take a look at the Bird opinion, the very first paragraph of the Bird opinion clarifies why the Supreme Court had jurisdiction in that case under 1292(a)(1) which is not applicable here.

As you may recall in Bird what Merrill Lynch did there was they moved to sever the state claims and they moved to stay the state claims and proceed on the federal claims. Judge Turrentine denied that motion.

Merrill Lynch appealed from that portion of Judge Turrentine's order staying the state claims so it was as appeal from the stay order of Judge Turrentine's decision.

What the Supreme court held was they had jurisdiction under 1292(a)(1) because that was tantamount to an injunction. What has Merrill Lynch appealed from with respect to your order?

If you will just bear with me, I think I can walk us through this as to why there is jurisdiction in this case.

In your order which I am reading from you make five separate orders. No. 2 is that you order that defendants' motion for an order compelling arbitration of the federal securities law claim is denied.

No. 3, defendants' motion for an order staying the federal court proceedings is denied.

Now if Merrill Lynch has appealed from both of these, I am going to take my place. However, I think if you will take a look at the notice of appeal, it clarifies beyond any doubt that portion of the order they have appealed from. It specifically states in the notice of appeal:

> "Merrill Lynch hereby appeals to the United States District Court, et cetera, from that portion of this Court's order on the 27th day of June, 1985 which denies the petition for order compelling arbitration of plaintiff's claims under the Securities and Exchange Act of 1934."

THE COURT: I know.

MR. KINSELLA: They do not appeal the stay order. Now the only reason that this Court conceivably could be divested of jurisdiction would be if under 1292(a)(1) there was an improper appeal and there is no appeal from the stay aspect of this case.

We have referred, your Honor, in a very late reply — but it was in response to a late opposition, to the Sealy Mattress case which holds that a denial of an order of arbitration of a claim is not appealable under 1292(a)(1) and I think — and I don't mean this disrespectfully toward Mr. Swank — there appears to be a suggestion that perhaps this was an appeal from your Honor's order denying the stay which it is not.

The notice of appeal — indeed their own moving papers here clarify the issue, so I think we are over the hurdle of jurisdiction. Indeed we have been before your Honor for the last two months talking about trial dates. This is the first time anybody has suggested that your Honor didn't have authority to set trial dates or conduct discovery or resolve discovery disputes in this matter so I think there is clearly jurisdiction with respect to this matter.

With respect to the issue of delay, there have been several factors here at play. First, we attempted to conduct an exhaustive review of the medical evidence in this case that was before your Honor to determine whether or not your Honor had considered everything that was in front of her.

Frankly, it was not until about a month and a half ago that we realized that the most critical portions of Dr. Cope's medical records that we wanted your Honor to review had in fact been blacked out. We did take a red liner and attempted to go over those portions of the medical evidence which we wanted your Honor to review

and we accomplished just the opposite. It was struck from the record. That was not discovered until we were here on another matter before your Honor.

In addition, there have been other factors which I am prepared to go into with respect to why we were slightly late in this. Your Honor may recall that it was about a month and a half ago when I requested of your Honor to file this motion for reconsideration.

I recognize your Honor didn't rule on the merits but you invited it. What I am suggesting is there is not a four-month delay here. At best there is a month-and-a-half to a two-month delay and that was in large part the result of our recent discovery that we had in fact obliterated the very portion of the record we wanted your Honor to review.

If your Honor believes there is jurisdiction, which I hope, and that I have not been dilatory in this, and I have tried my level best to get this matter back before your Honor, I would like to spend a few minutes talking about the merits of why we are here.

On the other hand, there is a full calendar.

THE COURT: We have gotten to the place now where a person on the staff of the Ninth Circuit is going to have a difficult time figuring out what we all have been doing.

Let us see if we can review everything now. We are in a position where I have entered an order that the state law claims must be arbitrated. In that order there was language that said that your client could read the agreement and understand what it said and as long as he could read the agreement and understand what it said he is bound to arbitrate it.

They said if that is true of the state law claims that the Court has ordered arbitrated, it must also be true of the federal securities claims.

I said, "No, I would not order arbitration of the federal securities claims" because I didn't think that was right, assuming, of course, that the arbitration clause bound him to everything that he could possibly be bound to.

Now they say, "Will you certify it?"

And I said, "Yes," smiling because I wanted to see what the Ninth Circuit would say and I still do. I read the paper every day hoping I will find that case decided.

Now they are up on the question of whether the federal claims have to be arbitrated as well as the state law claims. You are in on a reconsideration of the order which I entered ordering the state law claims to be arbitrated and also ordering that there be no stay of that; is that right?

MR. KINSELLA: May I complicate it just a little bit more?

THE COURT: It is probably worse than that.

MR. KINSELLA: Believe it or not, it is. There are essentially two appeals. What Mr. Swank —

THE COURT: You have got one, too?

MR. KINSELLA: Mr. Swank has appealed on two grounds. He has taken a 1292(b) appeal.

THE COURT: Yes.

MR. KINSELLA: He is suggesting that this Court is divested of jurisdiction because of his 1292(a)(1) appeal.

THE COURT: You are right.

MR. KINSELLA: Yes. My first thought was not to file it.

THE COURT: In the 15 minutes you get in the Ninth Circuit somebody is going to get up and explain this?

MR. KINSELLA: I agree and we probably will not even get past "Good morning, your Honors."

THE COURT: Somebody is going to say, "What have you done?"

MR. KINSELLA: I know. Without sounding too self-serving, I am giving us an opportunity to resurrect this whole mess and get the background before your Honor but I know this is causing Mr. Swank great pain.

In point of fact, there is jurisdiction in front of the Court to hear what I am here for. I don't think there is any question about that.

I also think in light of what we did that there is a reasonable basis for reconsidering this, that is the delay.

What I am requesting of your Honor is this: If you believe there is jurisdiction for me to be here speaking and if I haven't been dilatory, I would like to spend — and I promise — no more than three minutes on the issue of the merits of why we are asking for reconsideration.

There is a full calendar, however, and if you think you do not have jurisdiction, I don't want to go forward. I do believe that that issue hopefully is quite clear and I would like to spend just a very brief period of time on the merits.

THE COURT: Let me hear Mr. Swank.

MR. SWANK: Your Honor, our brief is being filed in the Ninth Circuit today. If the Court reconsiders this issue and as the Court said holds for some reason that

Mr. Delman did not have the capacity to enter into a contract —

THE COURT: Well, I couldn't do that on what I have in front of me.

MR. SWANK: I am sorry, your Honor?

THE COURT: I couldn't do that.

MR. SWANK: No, your Honor. You don't have any evidence in front of you on Mr. Delman's condition.

THE COURT: I don't know whether he has the capacity or not. From what I looked at on the first go-around it appeared to me that there was no reason to hold that he didn't.

MR. SWANK: Yes. Your Honor, we are now in the posture in the Ninth Circuit of agreeing with the Court that it is an adhesion contract but there is no suggestion that Mr. Delman did not have the capacity to enter into it. If the Court reconsiders that now and changes our ruling then we will spend a lot of time on an appeal.

THE COURT: What position did you take with respect to adhesion?

MR. SWANK: Your Honor, I think we agree that the contract is an adhesion contract but as the Court ruled all adhesion contracts are not, therefore, unenforceable.

THE COURT: No, they are not.

MR. SWANK: Indeed the Merrill Lynch contract has been held by California courts to be enforceable and it so held in Parr. The adhesion contract or the contract the Court found was a fair contract because the procedures embodied in the contract were fair, the arbitration procedures.

There is no suggestion now before the Court that those procedures are anything but fair. There is no suggestion or reason to believe that Mr. Delman won't be treated fairly in arbitration or that his capacity to understand trades or not understand trades he made is going to be precluded in arbitration.

All those issues are going to be before the arbitrators in a process that this Court and California courts have found to be fair.

Mr. Delman, the plaintiff, and his attorneys, had a full opportunity to brief whatever special defenses they believe Mr. Delman has. I am not sure there are any special defenses to an arbitration agreement that the Courts finds to be fair, binding and insures fairness in the arbitration procedure.

However, I would not like to take that up on appeal at this late date. I would prefer finding in the record as it is, that Mr. Delman could read the contract had he bothered to do so. I think now to go back and reconsider that when we had that ruling and I think at least four months ago the Court's initial ruling on the bench and then it took a month to get the order entered — we have had that ruling for four months.

There has been no suggestion that that ruling was wrong or that the Court didn't have the evidence Mr. Kinsella wanted before it at that time. I think to go back now and reconsider it —

THE COURT: If you win on appeal where are we then?

MR. SWANK: We are —

THE COURT: You may well think of that.

MR. SWANK: We are arbitrating all of Mr. Delman's claims except his RICO claims which the Court allowed him to amend which I suppose we will try.

THE COURT: So we would come back down here.

Would he be foreclosed at that point to say that it hadn't been properly before the Court, that he didn't understand it, he wouldn't have been able to understand, wouldn't have had the capacity.

That is not foreclosed, is it, because that is not an issue on appeal?

MR. SWANK: I am not sure that it is an issue on appeal, your Honor. I believe it is involved in the appeal which is the test in the present instance. It certainly is involved in the appeal to the extent if the Court reverses its finding or holds an additional hearing there won't be an appeal in its present posture.

I suppose if it came back from the Ninth Circuit on the arbitration it would probably get before the Court again, certainly at the point where the Court is asked to confirm the arbitrator's award.

I suppose if at that point the Court felt that Mr. Delman had been treated unfairly in arbitration or that he was unable to agree to arbitrate, that you could then reconsider that issue.

I think that makes a lot of sense to do it that way, frankly, rather than moving the appeal at this stage.

THE COURT: This is just a passing comment. I understand. We have created for the Ninth Circuit a real problem here.

MR. SWANK: Yes, your Honor.

THE COURT: But it is not our problem any more on this level.

MR. SWANK: It is my problem.

THE COURT: I say good luck to them. Let me just tell you in passing that I don't think I ever made a finding as to his competency. I think I said that the record did not show that he was incompetent to do that.

MR. SWANK: Your Honor, I believe that you did say that there is no claim that Mr. Delman was unable to read and understand. That is my recollection.

THE COURT: Yes. The question is if there wasn't any claim at that point could there ever be a claim of that nature. I think I have to say this to you. I can't grant the motion for reconsideration because I actually don't believe I have the jurisdiction to do this now.

I can't open up this whole thing now but I don't say that it can't be opened up. I spent quite a long time yesterday thinking about that. I reread the order and I also considered whether Mr. Kinsella is right about being taken back at the statement that he could read and understand what that clause was if he wanted to so I will deny the motion to reconsider.

You will go up on appeal and then you will consider whether I am correct about what I said because I think that issue when you come back from appeal is open.

MR. KINSELLA: Thank you.

MR. SWANK: Thank you.

THE COURT: You prepare an order, Mr. Swank.

MR. SWANK: Your Honor, on a related matter, we came in and they made a motion to amend the RICO claim.

THE COURT: I am just denying the motion to reconsider and I am not doing it solely on the ground of jurisdiction.

When you do the order bear that in mind.

MR. SWANK: I understand this relates to the amendment of their complaint to add a RICO claim. We moved to — there is no entry of an order yet. We would like to pursue an appeal of that order as well.

THE COURT: We will see.

MR. SWANK: It was their motion to amend. We said, "amend," but we think it should be compelled to arbitration. They opposed it. The Court allowed them to amend the complaint and deny the order compelling arbitration.

THE COURT: There is no order.

MR. SWANK: There is no order.

THE COURT: You do an order.

MR. KINSELLA: Your Honor, in that regard there is also a pending motion for summary judgment.

THE COURT: Yes.

MR. KINSELLA: One final question. I am not sure I understood or want to frankly understand the full import of your Honor's ruling.

THE COURT: I denied the motion for reconsideration. That is what I wanted to put in the record.

MR. KINSELLA: On the basis of jurisdiction. Does that mean until the Ninth Circuit rules on the 1292(b) appeal?

THE COURT: I think that I no longer have jurisdiction to do anything about those orders.

MR. KINSELLA: The appeal orders?

THE COURT: Yes, those that have been appealed.

MR. SWANK: Yes, your Honor.

MR. KINSELLA: All right. Thank you, your honor.

THE COURT: I could point you to a case but I think that that will be pointed out to you anyway in the conference.

All right.

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

BETH E. AUBERTSON — Official Reporter

10-6-85 — Date

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 7, 1987, I served the within Opposition to Petition for a Writ of Certiorari in re: "Merrill Lynch, Pierce, Fenner & Smith Inc. vs. David Delman" in the United States Supreme Court, October Term 1986, No. 86-668;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Peter Brown Dolan
Overton, Lyman & Prince
550 So. Flower Street
6th Floor
Los Angeles, California 90071

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 7, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

FILED
JAN 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-668

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,
Petitioner,

VS.

DAVID DELMAN,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITIONER FOR CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF PETITIONER FOR CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This reply brief addresses only the contention made in Respondent's brief in opposition that the legal issue presented — whether Respondent's claims made under the Securities Exchange Act of 1934 are subject to arbitration — is not ripe for decision because Respondent may, at some future point, file a motion for reconsideration in the District Court which, if granted, would moot this appeal. Respondent's argument confuses the concepts of mootness and ripeness. The law has long recognized that the possibility that a case may become moot in the future does not make it non-justiciable. For example, in *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 692 n.32, 61 L.Ed.2d 823, 850 n.32, 99 S.Ct. 3055 (1979) the Court decided the issue of a federal district court's power to enforce certain fishing regulations through its contempt power, even

though that issue might become moot in the future because of the state's willingness to enforce the regulations:

> "The issue is still alive since state implementation efforts are now at a standstill and the [federal court] orders are still in effect."

See also U.S. v. Sharpe, 470 U.S. 675, ____ n.2, 84 L.Ed.2d 605, 612 n.2, 105 S.Ct. 1568 (1985) (Fact that the government's appeal from a decision reversing criminal convictions might become moot if the fugitive defendants were not recaptured did not foreclose decision.) Here, until Respondent successfully moves to amend the court order finding that he has signed a binding arbitration agreement, that order is still in effect and is the basis for a decision by this Court on the issue of the arbitrability of claims under the Securities Exchange Act of 1934. *See Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27 n.15, 64 L.Ed.2d 702, 722 n.15, 100 S.Ct. 2009 (1980). (Appeal from a judgment invalidating statutes which might expire in 21 days was not moot because the statutes "remain in effect so the case has not become moot, whatever the ultimate disposition of the pending bills.")

The issue presented here, although it may be mooted in the future, is now ripe for decision. "Ripeness" is a "problem . . . best seen in a two-fold aspect, requiring [the court] to evaluate both the fitness of the issues for a judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149, 18 L.Ed.2d 681, 691, 87 S.Ct. 1507 (1967).

The first part of this test focuses on whether additional factual evidence is necessary to aid the court in deciding the issue presented, or whether the issue presented is solely a legal one. *Id.* Where the issue presented is solely a legal one, as it is here, a dispute is ripe for decision even

though future events affecting the dispute may occur. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 57 L.Ed.2d 595, 98 S.Ct. 2620 (1978) (Dispute ripe because "[A]lthough it is true that no nuclear accident has yet occurred, and that such an occurrence would eliminate much of the existing scientific uncertainties surrounding the subject, it would not, in our view, significantly advance our ability to deal with the legal issues presented, nor aid us in their resolution."); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Committee*, 461 U.S. 190, 201, 75 L.Ed.2d 752, 763, 103 S.Ct. 1713 (1983) (Dispute ripe because "[T]he question of preemption 'is predominantly legal . . .' "); *Pile Drivers Local 2375 v. Smith*, 695 F.2d 390, 392 (9th Cir. 1982) (Dispute ripe because "[P]ractically all of the issues in this case are purely legal ones. We, therefore, do not believe that waiting . . . to engage in additional activities in the performance of its contract would 'significantly advance our ability to deal with the legal issues presented, nor aid us in their resolution.' "). Here, the single issue presented by this Petition for Certiorari is an abstract legal one: Whether claims made under the Securities Exchange Act of 1934 are arbitrable. No additional factual development can occur which will aid the court in determining this purely legal issue.

The second part of the "ripeness" test focuses on the hardship and relative certainty of injury to the Petitioner caused by the status quo. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 18 L.Ed.2d 681, 691, 87 S.Ct. 1507 (1967). Here, the injury to Petitioner caused by the Ninth Circuit's decision is immediate and apparent as it is presently being denied any right to compel arbitration of Respondent's claim under the Securities Exchange Act of 1934. This inability causes the expenditure of money in

discovery and trial preparation which would be avoided if Respondent were compelled to arbitrate. Further, denial of this Petition will effectively deprive Petitioner of any review of the Ninth Circuit's ruling until *after* the trial in this matter since the district court has not stayed the proceedings before it. Thus the harm suffered by Petitioner is not only presently occurring, but will certainly continue to occur until the issue presented by this petition is decided.

Even if Respondent were to file his motion for reconsideration, decision on the issue presented by the petition herein would not be avoided unless he were successful. Respondent's position that he can delay decision of an important legal issue and reap the benefits of the Ninth Circuit's decision until the happening of a contingency that he controls is analogous to an administrative agency claiming that persons injured by administrative rulemaking cannot seek redress until the agency actually prosecutes them. This Court has long held that the *in terrorum* effect of the status quo makes such controversies ripe where one of the parties suffers a present injury. *Babbitt v. United Farm Workers National Union,* 442 U.S. 284, 301-03, 60 L.Ed.2d 895, 908-10, 99 S.Ct. 2301 (1979); *see also, McKenna v. Peekskill Housing Authority,* 83 F.R.D. 600, 603-04 (S.D.N.Y. 1979) (Plaintiff's action challenging visitation policy of housing authority not moot despite the impending "federalization" of the housing authority since plaintiff's "lawsuit should not be controlled by the federal government's proposed construction schedules.")

The fact that some future judicial action may moot this controversy does not provide any ground for concluding that it is not presently justiciable. The appropriate way to respond to Respondent's claim is to grant the Petition for Certiorari and, should Respondent file and succeed in a

motion for reconsideration which moots the legal issue before the Court, then the parties can inform the Court of the occurrence of the contingency. The contingency identified by Respondent does not differentiate this case from any other case before this Court since future events can render any case moot. *See Eisler v. United States,* 338 U.S. 189, 194, 93 L.Ed. 1897, 1901, 69 S.Ct. 1453 (1949) (Murphy, J. dissenting) ("That the case may become moot . . . does not distinguish it from any other case we decide. For subsequent events may render any decision nugatory.") Until such time as this case is actually mooted, however, it remains ripe for decision because the issue presented is purely legal and Petitioner is currently suffering an injury.

Respectfully submitted,

PETER BROWN DOLAN
Counsel of Record
OVERTON, LYMAN & PRINCE
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Attorneys for Petitioner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 27, 1987, I served the within Reply Brief in Support of Petitioner for Certiorari in re: "Merrill Lynch, Pierce, Fenner & Smith Inc. vs. David Delman" in the United States Supreme Court, October Term 1986, No. 86-668;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 27, 1987, at Los Angeles, California

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